PROGRAM

8:00 a.m. to 8:30 a.m.	**Registration**
8:30 a.m. to 8:45 a.m.	**Odds and Ends** *Nick Drees*, Federal Public Defender
8:45 a.m. to 10:15 a.m	**SORNA Cases/Civil Commitment** *Jennifer Coffin*, Sentencing Resource Counsel Nashville, TN
10:15 a.m. to 10:30 a.m.	**Break**
10:30 a.m. to 11:00 a.m.	**Federal Sentencing Before *Gall*, Waiting For the Other Shoe to Fall** *B. John Burns*, Assistant Federal Public Defender Des Moines, Iowa
11:00 a.m. to 11:45 a.m.	**Supreme Court & Eighth Circuit Update** *John Messina,* Research & Writing Attorney Federal Public Defender's Office Des Moines, IA
11:45 a.m. to 1:00 p.m.	**Lunch (On your own)**
1:00 p.m. to 1:20 p.m.	**Southern District Probation Office Initiatives** *Burt Maroney, Kito Bess and Tim Heinrichs* U.S. Probation Officers Des Moines, IA
1:20 p.m. to 1:40 p.m.	**Federal Practice Pointers** *Robert Dopf and Kelly Mahoney*, Former Asst. U.S. Attorneys and current CJA Panel Members Des Moines, IA
1:40 p.m. to 2:00 p.m.	**Pretrial Publicity** *Montgomery Brown*, CJA Panel Member Des Moines, IA
2:00 p.m. to 3:00 p.m.	**"Bondage, Removal, Raids, Ice Men, Bars to Admission ... And Yes, We're Talking Immigration"** *Angela Campbell and Priscilla Forsyth,* CJA Panel Members Des Moines, IA
3:00 p.m. to 3:15 p.m.	**Break**
3:15 p.m. to 4:15 p.m.	**Corporate Compliance Programs, The McNulty Memorandum, and the "Ethics" of the Right to Counsel under the Sixth Amendment: Window Dressing or Real Change?** *John Fatino*, CJA Panel Member Des Moines, IA

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ODDS & ENDS

PRESENTED BY

NICK DREES
FEDERAL PUBLIC DEFENDER

ODDS & ENDS
Fall 2007

I. The Crack Cocaine Amendment

A. See attached memo - "Applying the Crack Amendments 101," by Defender Sentencing Resource Counsel

B. The Sentencing Commission's "Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive" (October 3, 2007) includes the following findings:

1. 19,500 inmates would be affected, including
   a. 160 inmates who were sentenced in the Northern District of Iowa
   b. 127 who were sentenced in the Southern District
2. Average reduction in sentence would be 27 months
3. 10,605 would receive reductions of 24 months or less
4. 1,315 would receive reductions of 49 months or more
5. 85.9% of those affected are black

C. Public hearing on retroactivity - Tuesday, November 13

II. Preserve this issue:

Supreme Court granted cert on 9/25/7 in *Begay v US*, No. 06-11543, on the question: "Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?"

III. Opportunity for 11(c)(1)(C) pleas while *Gall v US* (challenging the 8th Circuit's "extraordinary circumstances test") is pending?

FRCrP 11(c) (emphasis added) says:

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

IV. Clients serving state time but facing federal prosecution not in limbo?

The Speedy Trial Act says in part:

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--
(A) undertake to obtain the presence of the prisoner for trial; or
(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

18 USC § 3161(j).

MEMORANDUM

To: All Defenders, CJA Panelists
From: Sentencing Resource Counsel
Date: November 1, 2007
Re: Applying the Crack Amendments 101

As of November 1, 2007, new rules apply for determining the base offense level in crack cases under § 2D1.1 of the advisory guidelines. This memorandum describes the amendments, explains how they work, and alerts you to the anomalies that lurk within them.

I. Determining Base Offense Level in Offenses Involving Crack Only

The Commission amended the Drug Quantity Table in § 2D1.1 so that crack quantities triggering the five- and ten-year mandatory minimums are assigned base offense levels two levels lower than before. The base offense levels for these quantities now correspond to guideline ranges that *include* (rather than exceed) the mandatory minimum. The Commission similarly adjusted the drug threshold quantities above, between, and below the mandatory minimum thresholds, with the net result being that for crack offenses, base offense levels across the board are two levels lower than they would have been before the amendment. *See* 72 Fed. Reg. 28,558, 28,571-73; U.S.S.G. App. C, Supp. Amend. 706; U.S.S.G. § 2D1.1 (2007).

For example, under the old guideline, at least 5 grams but less than 20 grams of crack was assigned a base offense level of 26 and a minimum guideline range of 63 to 78 months, which *exceeded* the mandatory minimum of five years by at least three months. Now, the same quantity of crack is assigned to base offense level 24, which corresponds to a minimum advisory guideline range (51 to 63 months) that *includes* the mandatory minimum. Likewise, the base offense level assigned to at least 50 grams but less than 150 grams of crack has been adjusted downward to offense level 30, which corresponds to a minimum advisory guideline range of 97 to 121 months. The remaining quantities above, between, and below these quantities have been similarly adjusted downward.

Here is a reader-friendly comparison of the old and new base offense levels:

Quantity	BOL under Former § 2D1.1	BOL under Amended § 2D1.1
4.5 KG or more	38	38
1.5 KG to < 4.5 KG	38	36
500 G to < 1.5 KG	36	34
150 G to < 500 G	34	32
50 G to < 150 G	32	30
35 G to < 50 G	30	28

Quantity	BOL under Former § 2D1.1	BOL under Amended § 2D1.1
20 G to < 35 G	28	26
5 G to < 20 G	26	24
4 G to < 5 G	24	22
3 G to < 4 G	22	20
2G to < 3 G	20	18
1G to < 2	18	16
500 MG to < 1 G	16	14
250 MG < 500 MG	14	12
< 250 MG	12	12

For offenses involving crack only, applying the amendment is easy: simply determine the base offense level in the new Drug Quantity Table in § 2D1.1 that corresponds to the quantity of crack your client has been proven responsible for. For quantities between 4.5 KG and 500 MG, the result will be two levels lower than under the old guideline. For quantities outside that range, there is no change in the base offense level.

ALERT: By recalibrating the crack cocaine quantity thresholds in this manner, the Commission has created a system in which the ratio of crack to powder cocaine varies wildly from one offense level to the next. Even worse, the ratio is often more severe for low-level players than it is for bigger dealers. Below are the new ratios:

LEVEL	RATIO
38	33:1
36	33:1
34	30:1
32	33:1
30	70:1
28	57:1
26	25:1
24	80:1
22	75:1
20	67:1
lower	50:1

As the guidelines are only advisory, if you find yourself looking at one of the higher ratios, argue that the court should not assign a ratio any higher than the lowest ratio of the bunch, which is 25 to 1. Ask the judge to make the independent assessment – under 18 U.S.C. § 3553(a) and pursuant to the district court's duty under *Booker* and *Rita* – that an advisory guideline range based on a higher ratio reflects "unsound judgment" on the part of the Commission and should not be followed.[1]

[1] *See Rita v. United States*, 127 S. Ct. 2465, 2468 (2007) (district court may conclude that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate "regardless."); *id.* at 2463 (The

II. Determining Base Offense Level in Offenses Involving Crack and Other Controlled Substances

The Commission also modified the mechanism for determining the base offense level in offenses involving crack and other controlled substances. The mechanism is set forth in new subdivision (D) of Application Note 10. *See* U.S.S.G. § 2D1.1 cmt. n.10(D) (2007). Although this determination is a bit more complicated than for offenses involving crack only, it is really not very different from the old method of determining the base offense level for combined substances, except that there is now a special marijuana equivalency table for the quantity of crack involved, which is derived from the new ratios between crack and marijuana quantities at each offense level. Here's how it works:

First, determine the base offense level for the quantity of crack involved in the case. Find the assigned marijuana equivalency for the crack offense level in the *special* table in that subdivision. *See id.* cmt. n.10(D)(i)(II). Convert the crack quantity to its marijuana equivalency under the special table, which is reproduced here:

Base Offense Level	Marihuana Equivalency
38	6.7 kg of marihuana per g of cocaine base
36	6.7 kg of marihuana per g of cocaine base
34	6 kg of marihuana per g of cocaine base
32	6.7 kg of marihuana per g of cocaine base
30	14 kg of marihuana per g of cocaine base
28	11.4 kg of marihuana per g of cocaine base
26	5 kg of marihuana per g of cocaine base
24	16 kg of marihuana per g of cocaine base
22	15 kg of marihuana per g of cocaine base
20	13.3 kg of marihuana per g of cocaine base
18	10 kg of marihuana per g of cocaine base
16	10 kg of marihuana per g of cocaine base
14	10 kg of marihuana per g of cocaine base
12	10 kg of marihuana per g of cocaine base

For example, 200 G of crack now corresponds to base offense level 32 in the Drug Quantity Table. Under the special marijuana equivalency table above, each gram of

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presumption is not binding, does not place any burden of persuasion or proof on either party, and does not reflect greater deference to the Commission's factfinding than to that of the district court, but merely "reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case," which is a "double determination").

For a more thorough discussion of how *Rita* can be used to support this argument, see Amy Baron-Evans & Dan Kaplan, *What is Lovely (and Not so Lovely) about* Rita: *Implications for* Gall, Kimbrough, *and Future Cases* (September 12, 2007), available at http://www.fd.org/pdf_lib/Rita_Memo_9.12.07.pdf.

crack at level 32 is equivalent to 6.7 KG of marijuana. Thus, 200 G of crack at level 32 is equivalent to 1340 KG of marijuana.

Second, determine the combined marijuana equivalency for the other controlled substances involved in the offense by using the regular Drug Equivalency Table (now located in subdivision (E) of Application Note 10) and by following the instructions in subdivision (B) of note 10. Basically, for each substance, convert each drug to its marijuana equivalent under the Drug Equivalency Table, add the quantities, and find the corresponding offense level for the total quantity in the Drug Quantity Table. *See* U.S.S.G. § 2D1.1 cmt. n.10(B).[2]

For example, say that the case involving 200 G of crack referred to above also involved 300 G of powder cocaine and 750 G of methamphetamine. Under the regular Drug Equivalency Table, the cocaine converts to 60 KG of marijuana, and the methamphetamine converts to 1500 KG of marijuana.

Third, add the marijuana equivalencies for all three drugs together and find the quantity in the Drug Quantity Table to obtain the combined base offense level.

As calculated above, the crack converts to 1340 KG of marijuana under the special equivalency table in subdivision (D) of Application Note 10; the cocaine converts to 600 KG of marijuana under the regular table in subdivision (E); and the methamphetamine converts to 1500 KG of marijuana under the regular table in subdivision (E). Adding these marijuana equivalencies results in a combined quantity of 3440 KG of marijuana (1340 KG + 60 KG + 1500 KG = 2900 KG), which corresponds to a combined base offense level of **32** for all three controlled substances involved in the offense.

ALERT: When this new mechanism was first promulgated May 2007, we quickly realized that the method for arriving at the appropriate offense level to which varying marijuana equivalencies were applied created the anomaly that an offense involving crack and other drugs could be assigned a higher base offense level than another offense involving significantly more crack and other drugs. In September 2007, the Commission amended subdivision (D) so that the special table applies only to determine the marijuana equivalency for crack, with the other equivalencies being determined under the regular table in subdivision (E), as described above.[3] This amended method is simpler to apply (and less confusing), and also seems to produce fewer anomalies. However, it appears that the mechanism will still produce unfair results in some cases, again due to the varying marijuana equivalencies at each crack offense level.

For example, an offense involving a quantity of crack and a quantity of another controlled substance could be assigned a base offense level higher than an offense involving the same total quantity of crack alone. Following the procedures outlined in

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[2] Note that for certain types of controlled substances, the marijuana equivalencies are "capped" and may require special counting. *See* U.S.S.G. § 2D1.1 cmt. n.10(B).

[3] *See* 72 Fed. Reg. 51,882-83 (Sept. 11, 2007).

subdivision (D), an offense involving 12 grams of crack and 6 grams of powder is assigned a combined base offense level of **26**. Here's how:

(1) 12 G crack = BOL 24 in the DQT. Multiply by 16 KG mj per g of crack under subdivision (D) = 192 KG mj

(2) 6 G powder cocaine. Multiply by 200 G mj per g of powder under subdivision (B) = 1.2 KG mj

(3) Add 192 KG + 1.2 KG = 193.2 KG mj, which is assigned a BOL 26 in the DQT.

In contrast, had the offense involved 18 grams of crack only, the assigned base offense level would only be **24** under the Drug Quantity Table.

If you come across such a situation or something similar, you may want to point out to the judge that these amendments are intended as only "interim" and incomplete fixes to the problems associated with the 100-to-1 ratio, and as such, are not perfect.[4] Again, ask the judge to make the independent assessment – under 18 U.S.C. § 3553(a) and pursuant to the district court's duty under *Booker* and *Rita* – that it need not follow an advisory guideline range that is <u>higher</u> for a combination of crack and another, less severely punished drug than it would be for crack alone.[5]

[4] U.S.S.G App. C, Supp., Amend. 706 (Reason for Amend.).
[5] *See Rita*, 127 S. Ct. at 2463, 2465, 2468; *see also supra* note 1.

SORNA CASES/ CIVIL COMMITMENT

PRESENTED BY

JENNIFER COFFIN
Research & Writing Attorney

Office of Defender Services
Legal, Policy and Training
Division
TRAINING BRANCH

www.fd.org

THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT RESOURCE PAGE

The Adam Walsh Child Protection and Safety Act of 2006 was enacted on July 27, 2006. In addition to establishing a national sex offender registry law, the Act made significant changes to sexual abuse, exploitation, and transportation crimes. The Act created new substantive crimes, expanded federal jurisdiction over existing crimes, and increased statutory minimum and/or maximum sentences.

I. OVERVIEW OF THE ACT / BAIL, DISCOVERY, & STATUTE OF LIMITATIONS PROVISIONS

- The Adam Walsh Child Protection and Safety Act of 2006 -- Part I (October 2006)
  by Amy Baron-Evans and Sara Noonan (National Federal Defender Sentencing Resource and Research and Writing Counsel)
  This paper gives a brief overview of the Adam Walsh Act and suggests some (though not all) possible legal challenges to the Act.

- Discovery in Child Porn Cases After Adam Walsh: 20 Questions

- Adam Walsh Act: Pretrial Litigation Including Pretrial Release and Discovery and Prophylactic Measures to Protect Our Clients
  by Nancy Joseph, Assistant Federal Defender, Federal Defender Services of Wisconsin, Inc.

- **Challenging Bail Provisions of Adam Walsh**
  On December 7, 2006, in *U.S. v. Crowell*, Magistrate Judge Leslie G. Foschio held that the Adam Walsh Act's requirement that specific pretrial release conditions be imposed on all defendants accused of certain crimes violates the Fifth Amendment's Due Process Clause, the Eighth Amendment's Excessive Bail Clause, and separation of powers. The case was resolved before the district court could rule on Magistrate Judge Foschio's decision, but the opinion and the briefs filed by AFPD Marianne Mariano of the Western District of New York provide a good reference point for challenging the mandatory pretrial release conditions.

- **Victory Under the Discovery Restriction Provision of the Adam Walsh Child Protection and Safety Act**
  On January 25, 2007, in *U.S. v. Knellinger*, Judge Payne, E.D. Virginia, found, based on extensive expert testimony, that a reasonable computer expert would not agree to take a case in which s/he was required to examine the hard drive on government premises because of the expense and difficulty of moving their equipment to a government facility and the inability to provide adequate assistance under those conditions. Thus, the court held, because "ample opportunity" for inspection was not available at a government facility, a mirror image had to be provided to the expert. Reading the statute in this way allowed the court to avoid the constitutional question presented if it were read otherwise.

II. SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA)

- The Adam Walsh Act -- Part II (November 2006)
  by Amy Baron-Evans and Sara Noonan (National Federal Defender Sentencing Resource and Research and Writing Counsel)
  This paper describes the Sex Offender Registration and Notification Act (SORNA) and its complex requirements. The paper also describes how the law might operate, and suggests some challenges it appears to invite.

- First Supplement to Adam Walsh Act - Part II (May 2007)
  by Amy Baron-Evans (National Federal Defender Sentencing Resource Counsel)
  This paper addresses new developments since the publication of the original Adam Walsh Act - Part II memo, including the Attorney General's interim rule regarding retroactivity, a favorable case applying the Ex Post Facto Clause, and the new sentencing guidelines.

- Second Supplement to Adam Walsh Act - Part II (Sept. 1, 2007)
  by Amy Baron-Evans, National Sentencing Resource Counsel)
  This paper discusses developments since the first Supplement to Adam Walsh Act II (May 2007), including recent dismissals of SORNA indictments and other relevant caselaw; an analysis of and potential challenges to DOJ's "SMART" Guidelines; a comparison of the Wetterling Act and SORNA; and a review of and potential challenges to the applicable Sentencing Guidelines.

- Select Dismissal Motions and Court Orders in SORNA Cases

- DOJ's "SMART" Guidelines
  The "SMART" Guidelines are for the purpose of providing "guidance and assistance" to jurisdictions in implementing SORNA, so they can be deemed in compliance by the "SMART" Office by the due date, July 27, 2009, and not lose federal funding. The guidelines were published for comment 5/30/07, see Fed. Reg. 30210-01, 2007 WL 1540140 (May 30, 2007), the comment period closed 8/1/07, and it is possible they will change in final form.

III. CIVIL COMMITMENT

- Adam Walsh Act III: It's Not the Sentence, It's the Commitment . . .(Sept. 10, 2007; revised Sept. 25, 2007)
  by Amy Baron-Evans and Sara Noonan (National Federal Defender Sentencing Resource and Research and Writing Counsel)
  Title III of the Adam Walsh Child Safety and Protection Act of 2006 established the Jimmy Ryce Civil Commitment Program for Dangerous Sex Offenders, now codified at 18 U.S.C. §§ 4247, 4248. Under this new program, the AG or anyone authorized by the AG or the Director of BOP may seek to civilly commit anyone in BOP custody by "certifying" him (or her) as "sexually dangerous." This memorandum describes the new civil commitment law and how BOP is interpreting and using it, and suggests ways to protect clients against being certified in the future.

- Dismissal Motions and Court Orders in 4248 Civil Commitment Cases

- BOP Sex Offender Treatment Program Materials
  (Program description and consent form)

- BOP Sex Offender Management Program Description

- BOP Materials Relating to 4248 Civil Commitments
  (BOP Interim Procedures (Dec. 21, 2006); Certification Review Panel Guidelines; proposed BOP regulations (Aug. 3, 2007); and SDP evaluation consent form)

- Sample Releases and Consent Forms

- Static-99 Coding Rules

- District of Oregon Order Regarding Conditions of Release
  In this case, the defense avoided the creation of sex offender evaluations that could later be used to subject the defendant to a civil commitment order. The Conditions of Release provide that the defendant participate in sex offender evaluation and counseling at the direction of U.S. Pretrial Services, but that counseling reports indicate the defendant is only attending and appropriately participating in treatment; any detailed reports must be sent under seal to the Court.

IV. ADDITIONAL RESOURCES

- No Easy Answers - Sex Offender Laws in the US
  Human Rights Watch, September 2007
  This report details evidence of the harm caused to people subject to this country's various sex offender laws, including the Adam Walsh Act. The report focuses on registration requirements but also contains information that could be useful in challenging several aspects of the Act. Part IV of the report contains recidivism statistics that are particularly valuable to attorneys challenging 4248 civil commitment proceedings.

- Sex Crimes Blog
  This blog by Corey Rayburn Yung, Professor of Law at John Marshall Law School, is devoted to the criminal laws regulating and punishing sexual violence. Among other information, it contains a set of links and documents related to the Adam Walsh Act.

- Adam Walsh and Civil Commitment Materials
  by Sentencing Resource Counsel; Federal Public & Community Defenders

(This compilation includes materials posted elsewhere on this page, as well as a PowerPoint presentation on all aspects of the Adam Walsh Act. It is particularly useful for training presentations.)

Office of Defender Services/Training Branch, Administrative Office of the United States Courts * One Columbus Circle, N.E. * Suite G-430 * Washington, DC 20544 Phone (202) 502-2900 * Hotline (800) 788-9908 * Fax (202) 502-2911

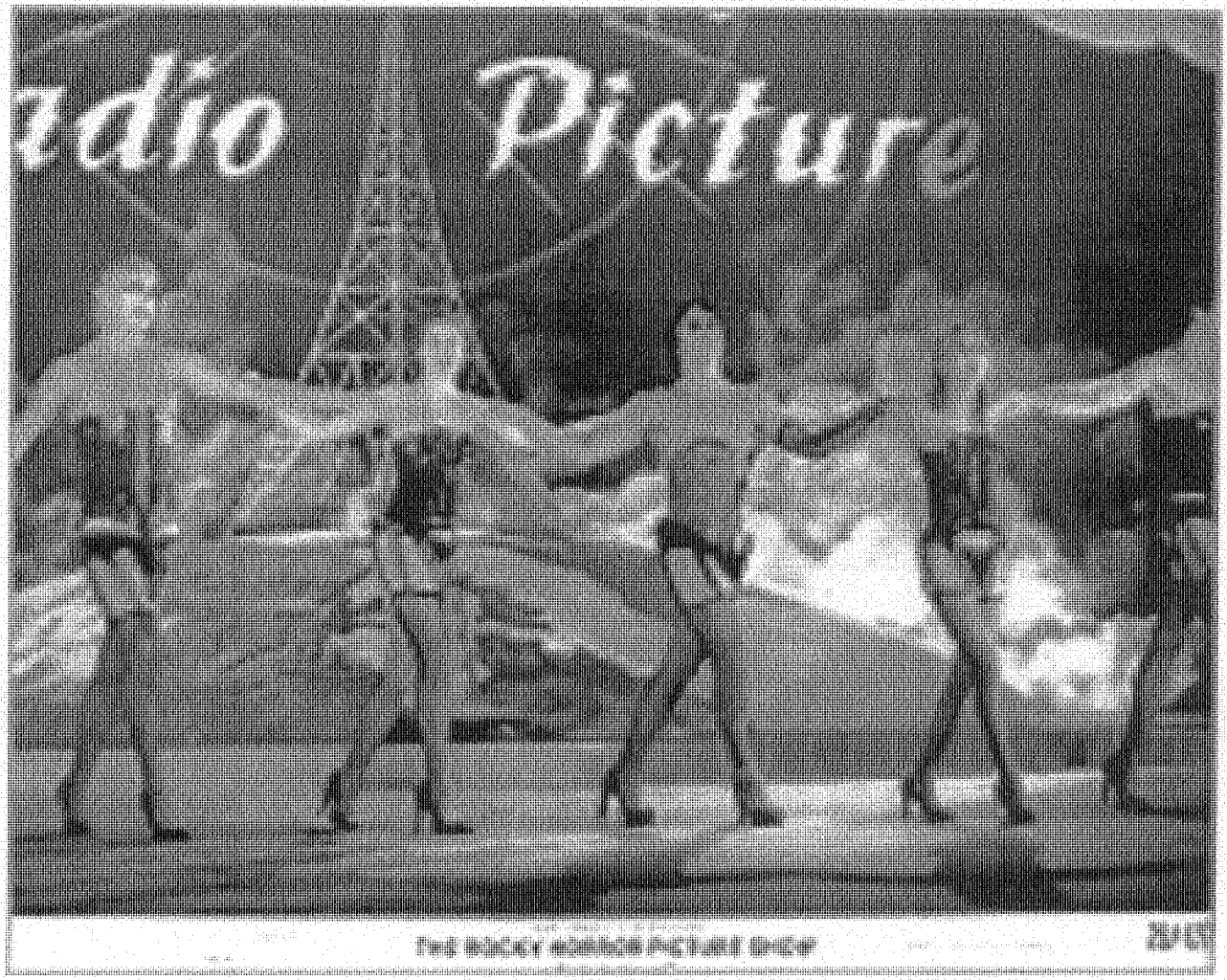
The Adam Walsh Act: Barely Legal

The Adam Walsh Act: Barely Legal

Federal Criminal Law & Procedure Seminar
Des Moines, IA
November 15, 2007

Sara Noonan, Sentencing Resource Project
Federal Public and Community Defenders

109th Congress



FORMER **Representative Mark Foley (R-FI),**
Chair, House Caucus on Exploited Children

Rep. Foley To Resign Over Sexually Explicit Messages to Minors

THE BLAIR WITCH PROJECT

YOU CAN WIN

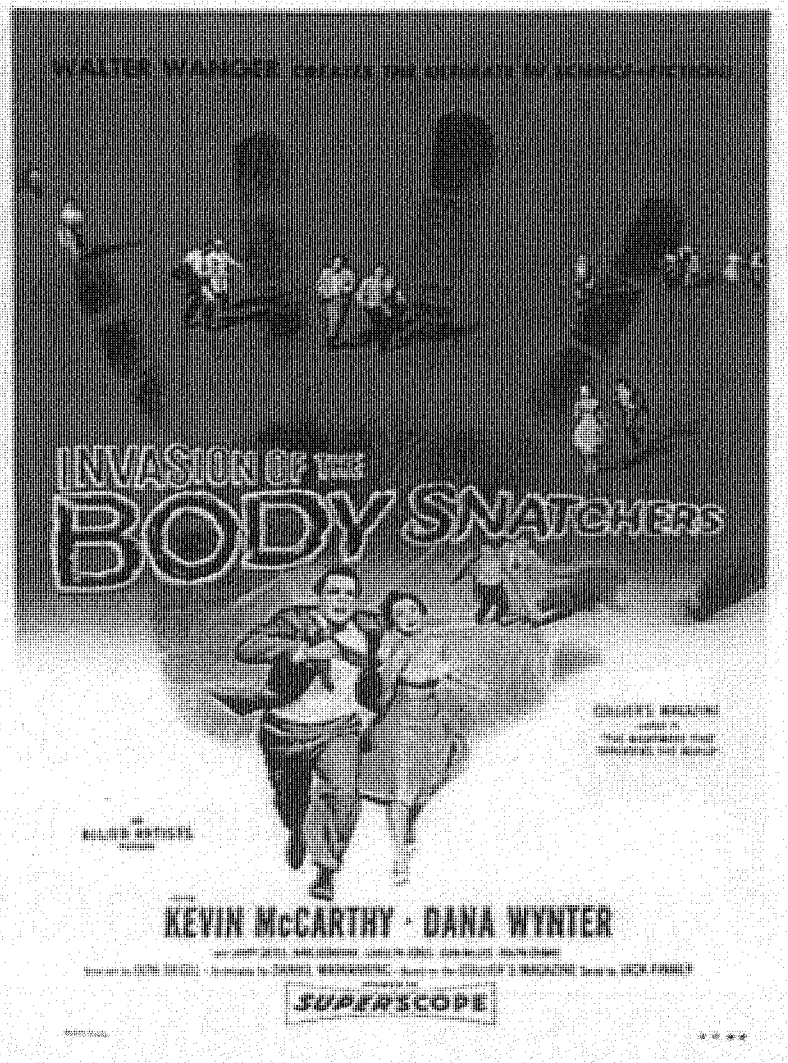
1) Civil Commitment
2) Failure to Register
3) Discovery of Alleged CP
4) Bail – Mandatory Electronic Monitoring
5) Sentencing

Adam Walsh Resources

www.fd.org/odstb_AdamWalsh.htm

1) Civil Commitment: Adam Walsh III
2) SORNA/Failure to register: Adam Walsh II & Supplements 1 & 2
3) Adam Walsh I
   - -New Crimes
   - -New Mandatory Minimums
   - -Increased Maximums
   - -No Statute of Limitations for Fed Sex Crimes
   - -Unconstitutional Limits on Discovery of *Alleged* CP
   - -Bail – Electronic Monitoring & other mandatory conditions if charged with minor V, firearms possession or failure to register
   - -Expanded DNA testing
4) New Sentencing Guidelines, eff. Nov. 1, 2007: Adam Walsh II Supplement 2, Part IV; Defender Letter, www.fd.org/pdf_lib/Sex_offense_amend_comments3607.pdf

Civil Commitment = 90% Chance Life Sentence



Definition of "Sexually Dangerous"

18 USC §§ 4247, 4248; BOP proposed reg.

- "Engaged or attempted to engage" – no need for any conviction of S.O. ever!
- "Sexually violent conduct"
- "Child molestation"
- "Serious mental illness, abnormality or disorder"
- "Serious difficulty in refraining from SVC or CM"

What is the procedure?

- "Certified" by BOP or AG
- Filed in district where client is being housed
- Stays release with no preliminary hearing, no bail
- No statutory timetable for hearing
- Judge eventually decides -- clear & convincing, counsel, op to testify, present evidence, subpoena witnesses, confront and cross

Who is in Danger?
Anyone in BOP Custody

- For a Federal Sex Offense
- For Any Federal Offense
- For a Probation or Supervised Release Revocation, need not be a new crime much less a sex offense, could be refusal to participate in "treatment" or other technical violation
- Pretrial Detention for any alleged offense
- DC prisoner

What are they using?

- Any info in PSR
  - Current contact offense
  - Any contact offense in criminal history
  - Chit chat of contact in PSR, seized emails
  - psych reports prepared for sentencing
- Any info disclosed during "treatment" or eval as condition of pretrial release, probation or SR
- Any info disclosed to BOP in "treatment" in SOTP or SOMP, or in SDP "evaluation"
- "Denial" or refusal to accept responsibility

Sex Offenders in BOP Custody

- SOTP
  - Voluntary Sign Up
  - Admit guilt of current offense
  - Admit all past sexual misconduct and deviant thoughts
  - Coerced and Uncorroborated "Victim List," updated every 6 months, failure to report any or to increase = "denial"
  - Submit to psych, polygraph, phallometric tests

- SOMP
  - Assigned based on PSF, Not Voluntary
  - Questionnaires, interviews, polygraph, plethysmograph
  - "Voluntary" but refusal → maintenance level pay, least desirable housing, no halfway house, U.S.P.O. is advised for supervised release conditions

AND

NO Statute of Limitations

on Federal Sex Crimes

AND can/will report to state authorities any admissions to non-federal offenses

SO . . . continuing threat of prosecution

Consequences of Refusal/Releases

Typical SR and Probation Conditions

- Answer inquires by PO
- Participate in treatment required by PO
- Waiver of confidentiality
- Revoking waiver may be a violation
- PO supposed to get court order to disclose to DOJ
- State and federal laws requiring "counselors" and "therapists" to disclose suspected sex abuse

SOMP

- not confidential if "suspected child abuse" or "potential harm to self or others"
- can refuse but will be penalized (housing, pay, halfway house, reported to PO for SR conditions)

SOTP

- Program voluntary, but if refuse to talk, expelled
- "I understand"
  - "staff of SOTP and BOP, DOJ and USPO may share information regarding my case"
  - "will report any incidents or suspicion of child abuse or neglect, past or present, to law enforcement agencies"
- "although admission to unreported crimes may result in additional criminal prosecution, the SOTP strongly encourages participants to be completely honest about the extent of their sexual deviance and sexual offense history"
- "I acknowledge my voluntary participation and understanding of the mandatory child abuse reporting laws."

SDP Evaluation

- I consent to evaluation consisting of interviews, review of records, polygraph and phallometric testing.
- I understand it will be
  - used to determine my eligibility for civil commitment as a SDP after I serve my sentence.
  - related to BOP officials and "others with a need to know" including the court, the govt, and my lawyer.
  - completed whether or not I participate.

Who will survive and what will be left of them?

"THE TEXAS CHAINSAW MASSACRE"

What happened is true. Now the motion picture that's just as real.

R

Only Those WHO JUST SHUT UP!!!

- Explain early and often!
- Only clients (probably) safe:

  (1) no current contact offense or any prior contact information in PSR, and

  (2) actually have no contact history, and

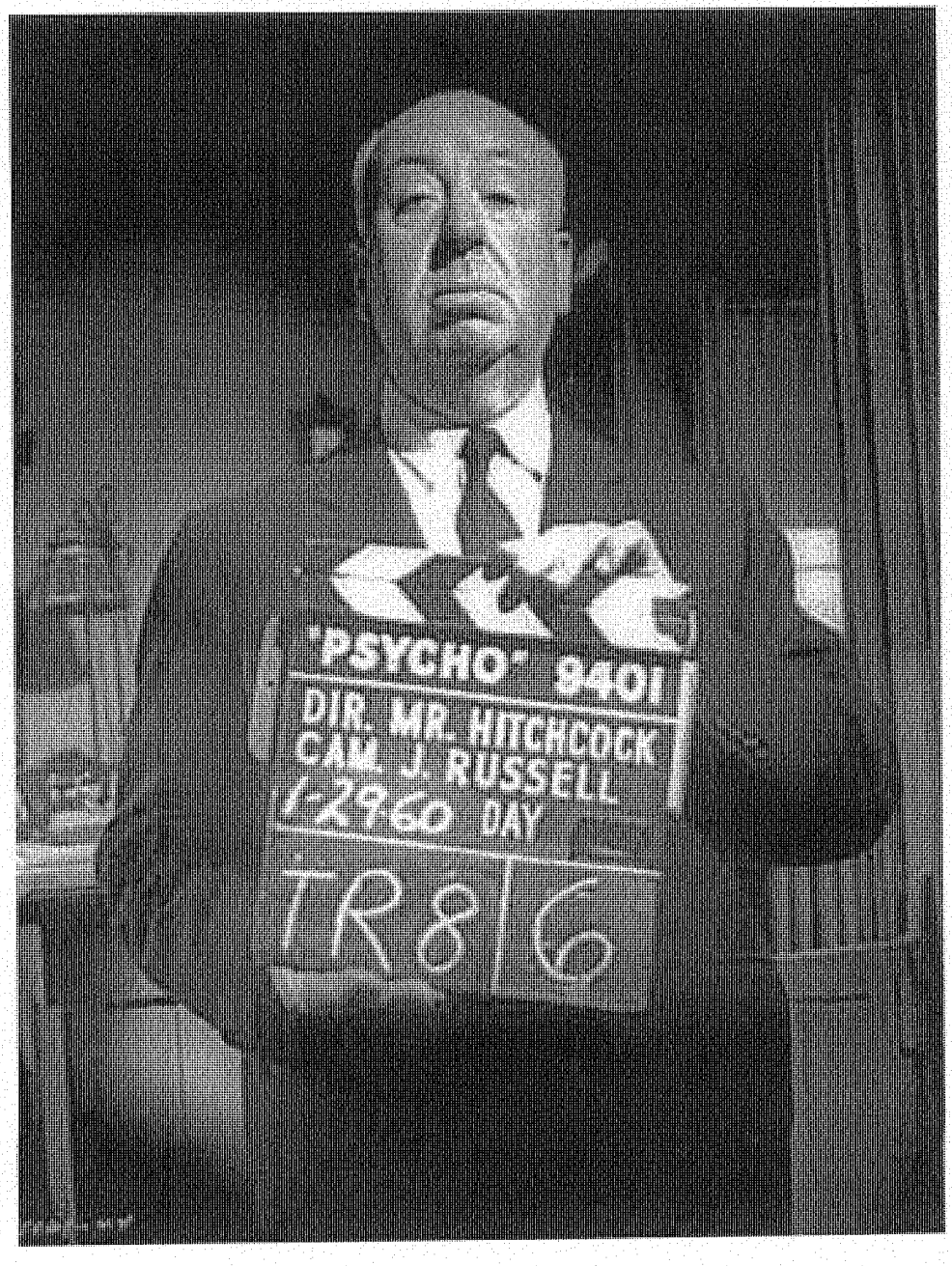
  (3) will not make it up to please their interrogators.
- Mantra: Say NOTHING, Sign NOTHING, Volunteer for NOTHING!

Plea and Sentencing

- No admission beyond elements at plea
- Object to anything in PSR that is inaccurate or exaggerated and get new PSR issued with the info deleted or redacted.
- No evaluation submitted if would reveal *any* contact history; move for funds *ex parte*
- ATTEND pre-sentence interview/ Refuse questions to client
- Mitchell v. US, 526 U.S. 314 (1999) (D retains 5th rights through sentencing; cannot be compelled to admit facts beyond elements and no adverse inference may be drawn from silence)
- Oppose judicial recommendation of BOP "treatment"

Litigation Update

- C.D. Cal. – dismissed on govt's own motion – court expert said not SDP
- E.D.N.C. – not a N&P exercise of congressional authority; clear & convincing violates DPC
- D. Mass. – 1 Mo. to Dismiss denied; 3 pending
- D. Haw. - pending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DIR. MR. HITCHCOCK
CAM. J. RUSSELL
1960 DAY
TR8 16

Sex Offender Registration and Notification Act "SORNA"

Sex Offender Registration and Notification Act "SORNA"

42 USC §§ 16901-962

Failure to Register

18 USC § 2250

Adam Walsh II

& Supplements 1 & 2

both @ www.fd.org/odstb_AdamWalsh.htm

Old / New

Wetterling 42 USC 14071-73

- No juvenile
- No simple possession
- No misdemeanors
- No conspiracy
- No attempt unless state makes attempt a crime and requires registration
- No stat rape if D is 18 or younger

SORNA 42 USC 16901-62

- Some juvenile
- Simple possession
- Misdemeanors
- Conspiracy
- Attempt
- Stat rape unless the victim was at least 13 and D was no more than 4 years older

Old / New

Wetterling 42 USC 14071-73	SORNA 42 USC 16901-62
States only	Tribes and territories too
Can use risk assessment model	No hearing on risk, to challenge classification, to get out early
Can publish all, some or none on IN	Automatic IN publication for all; may exclude Tier I other than "specified offense against a minor"
10 years life if prior convictions, aggravated offenses or "sexually violent predator"	15 years (tier I); 10 if "clean record" 25 years (tier II) life (tier III); 25 if "clean record"

Old / New

Wetterling 42 USC 14071-73

- One-year misdemeanor
- 10-year max if second or subsequent

- States "endeavored" to implement.
- No prosecutions until SORNA

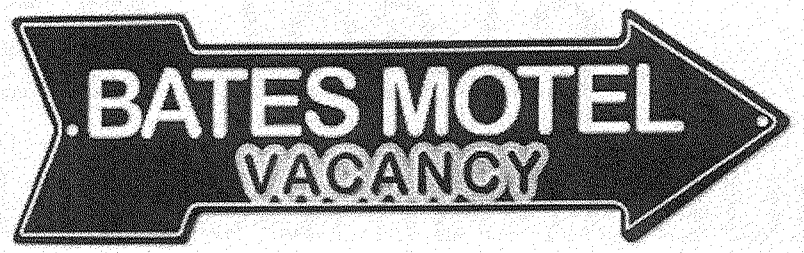
SORNA 42 USC 16901-62

- 10-year max

- Not yet implemented by any jurisdiction, except maybe Ohio

Registration Requirements
42 USC 16913

- Initial Registration:
  - Each J where resides, works, goes to school, & was convicted (if different from where resides)
  - Before complete term of imprisonment OR within 3 days of receiving non-prison sentence



Registration Requirements
42 USC 16913

- Verify Registration:
  - In-person at *each* J
  - every year (Tier 1)
  - every 6 months (Tier II)
  - every 3 months (Tier III)

Registration Requirements
42 USC 16913

- Update Registration:
  - Within 3 days of any change to name, residence, employment or student status
  - Can be to only 1 of the required Js, but must be <u>in person</u>

Tier Levels, 42 USC 16911

- TIER III – Life, unless juv adjud & "clean" record 25 years:
  - Punishable by > 1 year and
    - = to or > severe than aggravated sexual abuse (adult or minor), sexual abuse (adult or minor), or abusive sexual contact against a minor < 13, or
    - kidnapping of a minor, or
    - after becoming Tier II offender

Tier Levels, 42 USC 16911

- TIER II – 25 years (no "clean" record break):
  - –Punishable by > 1 year and
    - = to or > severe than most other sex offenses against a minor, or
    - occurs after becoming Tier I offender

Tier Levels, 42 USC 16911

- TIER I – 15 years unless "clean" record 10 years:
  - Any other sex offense, i.e., any # punishable < 1 year (e.g., all tribal convictions), possession of child porn 1st offense, stat rape if age difference > 4 years

New SORNA Crimes

Adam Walsh II at 13-32

- Failure to register, 18 USC § 2250(a)
  - 10 year stat max
  - deportable offense

- Crime of violence under federal, D.C., tribal, or territorial law while unregistered, 18 USC § 2250(c)
  - 5 year consecutive mandatory minimum (30 year stat max but new 2A3.6 makes it a flat 5)

- Enumerated federal felony involving a minor while being required to register under the law of *any* jurisdiction, 18 USC § 2260A
  - 10 year consecutive mandatory

Relevant Dates

- July 27, 2006 – signed into law
- February 28, 2007 – AG "interim rule" deems SORNA retroactive
- July 27, 2009 – deadline for implementation by all jurisdictions
- May 30, 2007 – "SMART" Guidelines published for comment
- August 1, 2007 – comment period for "SMART" Guidelines closed
- ??? Date of implementation by the jurisdiction -- No jurisdiction yet except maybe Ohio

Duty to Notify and Ensure Registration, 42 USC 16917(a)

An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register--

(1) inform the sex offender of the duties of a sex offender under this title and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and

(3) ensure that the sex offender is registered.

SOs convicted before July 27, 2006, or before implemented by jurisdiction?

- AG has the "authority" to decide if retroactive!

- If AG decides retro, AG must "prescribe rules for the registration of"
  - SOs convicted before July 27, 2006
  - SOs convicted before implementation in the jurisdiction
  - "other categories of sex offenders who are unable to" register before completing a sentence or within 3 business days of sentencing.

42 USC 16913(b), (d), 16917(b).

2/28/07 "Emergency" Interim Rule
See Adam Walsh II Supplement 1

- "SORNA requirements apply to all sex offenders, including sex offenders convicted of their registration offenses before the enactment of SORNA" even if not required to register under state or federal law at time of conviction.
- Stated purpose: To prevent defense that SORNA is not retro because no reg says they are.

"SMART" Guidelines, 5/30/07

Supports EPF & Notice Arguments

See Adam Walsh II Supplement 2

- **No one is required to register under SORNA if the jurisdiction has not implemented yet**
  - formally determined by the SMART Office, and not due until 7/27/09.
- **Jurisdiction must fully notify and ensure registration of persons with past SOs**. Why? E.g.,
  - registration not required under prior law
  - was no registry at the time
  - registration and update requirements different

"SMART" Guidelines – cont'd.

- **No notification or registration required for past SO convictions for persons who do not remain in or re-enter the system; only those**
  - incarcerated or under supervision
  - subject to existing registration requirement
  - re-enter system for new crime
- **No registration required if duration has passed**
  - Tier I - 15 years; 10 years if "clean record"
  - Tier II - 25 years
  - Tier III - 25 years if "clean record"

18 USC 2250(a) Elements

Whoever:

Is "required to register under the [SORNA]," *i.e.*

(a) stands (validly) convicted

(b) of a sex offense as defined in SORNA

(c) that occurred at a time and place (legally) covered by SORNA

For a federal, tribal, DC or territorial offense, **or** Travels in interstate commerce, and

Knowingly fails to register or update "as required by SORNA"

Shall be imprisoned up to 10 years

Statutory Construction/ Constitutional Avoidance

- D who traveled in ISC before AWA not covered by plain language "travels." US v. Bobby Smith (E.D. Mich., Mar. 8, 2007); US v. Muzio (E.D. Mo. July 26, 2007); US v. Sallee (W.D. Okla. Aug. 13, 2007)
- D who traveled or failed to register after AWA but before "interim" rule on 2/28/07 not covered by plain language. US v. Heriot (D.S.C. July 27, 2007); US v. Marvin Smith (S.D. W. Va. June 13, 2007); US v. Kapp (M.D. Pa. May 16, 2007); US v. Deese (W.D. Okl. Sept. 21, 2007);); US v. Patterson (D. Neb. Sept. 21, 2007)

Ex Post Facto

- **2250(a) is EPF** as to any alleged travel or failure to register before AWA enacted (7/27/06), DOJ interim rule (2/28/07), or implementation by jurisdiction (7/27/09) b/c it's a criminal statute that
  - Makes it a crime not to register as required by SORNA when it formerly was not a crime. US v. Muzio (E.D. Mo. July 26, 2007); US v. Stinson (S.D. W. Va. Sept. 7, 2007); US v. Cole (S.D. Ill. Sept. 17, 2007); US v. Deese (W.D. Okl. Sept. 21, 2007); US v. Patterson (D. Neb. Sept. 21, 2007)
  - Raises the max from one to ten years. Ibid; *US* v. Bobby Smith (E.D. Mich., Mar. 8, 2007); US v. Sallee (W.D. Okla. Aug. 13, 2007)
- SORNA is EPF with respect to date of conviction of sex offense b/c clearly punitive – Compare SORNA with Smith v. Doe, 538 U.S. 84 (2003). *See* Adam Walsh II at 38-43 – important once implemented by jurisdictions, deadline for which is 7/27/09.

DPC Requires Specific Notice of SORNA Requirements

*Not possible until jurisdiction implements SORNA.

*Not possible if D does not remain in or re-enter the system.

*Notice under pre-existing law is not a proxy.

- United States v. Marvin L. Smith (S.D. W. Va. June 13, 2007)
- United States v. Barnes (S.D.N.Y. July 23, 2007)

Non-Delegation Sep. of Powers

- Congress itself must declare a law retroactive. INS v. St. Cyr, 533 US 289, 316 (2001); Landgraf v. USI Film Products, 511 U.S. 244 (1994).
- Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)
- Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)
- AG is worried. See Adam Walsh Act II Supplement at 3-4

Commerce Clause (SORNA)

Nothing to do with

- "channels of interstate commerce"
- "instrumentalities of" or "persons or things in interstate commerce," has no travel element
- Economic activity
  - No "economic character"
  - Unlike local marijuana growing which has an interstate market (Raich)
  - No cong findings
- AG interim rule: no CC authority to require persons to register who do not travel. *See* AWA II Supp. at 4.

Jones v. US, 529 U.S. 848 (2000); US v. Morrison, 529 U.S. 598, 614 (2000); US v. Lopez, 514 U.S. 549 (1995)

Commerce Clause (2250(a))

Requires a fed conviction or travel

- No required nexus – causal, temporal or intentional – between failure to register and travel
- Compare Travel Act -- requires travel after committing a crime with intent to commit another crime
- No fed jur to require registration for a state crime in the first place

Other Arguments – see Terwilliger M to D

- 2250 by its terms does not criminalize F to R for state sex offense
- Violates 10th Amendment
- Violates Right to Travel

Not "Convicted"?

- Never convicted
- Does not currently stand convicted pursuant to state law, e.g., the convicting jurisdiction has expunged, pardoned, set aside, vacated, overturned, and treats it as null & void.
- Compare "SMART Guidelines at 30216 with Adam Wash II Supp. 2 at 12.

Violates State Constitution?

- 42 USC 16925(b) – some aspect of SORNA would violate jurisdiction's constitution, "as determined by a ruling of the jurisdiction's highest court"
- E.g., state constitution requires risk assessment determined with due process hearing.

Conviction invalid?

- Foreign conviction obtained with procedures that do not comply with US standards of due process?
  - AG says Canada, Great Britain, Australia, New Zealand, OK'd by U.S. State Dept. Country Reports on Human Rights Practices
  - AG says "no qualifications" OK !!??
  - Separation of Powers violation – AG is not a court
  - Any conviction obtained without impartial tribunal, right to respond and present evidence, or counsel. Compare SMART Guidelines at 30216-17 with Adam Walsh II Supp. 2 at 13.
- Tribal convictions – no duty to register if without counsel. See SMART Guidelines at 30216 .

Was it a Sex Offense as Defined in SORNA?

See Adam Walsh II

- "criminal offense that has an element involving a sexual act or sexual contact with another," § 16911(5)(A)(i)
- "specified offense against a minor," § 16911(5)(A)(ii) & (7)
- all federal offenses in Chs. 109A, 110, 117, 18 USC 1591, § 16911(5)(A)(iii)
- military offense defined by Sec. of Defense, § 16911(5)(A)(iv)
- juvenile adjudications if at least 14 y.o. and = to or > severe than aggravated sexual abuse, § 16911(8)
- Not consensual sexual conduct
  - between adults if V not under D's custodial authority
  - if V was at least 13 and D not > 4 years older, § 16911(5)(C)

Not listed in SORNA at all, but deemed to be a S.O. by "SMART" Guidelines?

SMART Guidelines purport to expand, *see* Adam Walsh II Supp. 2 at 13-15. *E.g.*, assault w/intent to rape supposedly = attempted rape.

Unauthorized Lawmaking

- Henrikson v. Guzik, 249 F.3d 395 (5th Cir. 2001)
- Fox v. Lappin, 409 F. Supp.2d 79 (D. Mass. 2006)
- Simmons v. Nash, 361 F.Supp.2d 452 (D.N.J. 2005)

Knowledge Element

- "knowingly fails to register or update a registration as required by the [SORNA]"
- Notice of SORNA requirements necessary under statute and DPC
- Means Govt Must Prove Notice BRD. Lambert v. California, 355 U.S. 225 (1958)
  - Absence of a signed form
  - Signed form without understanding – Can't read? No interpreter? Mentally impaired?
  - Signed form shifts burden of proving lack of knowledge to the defendant, in violation of the Due Process Clause. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970).
- Failure to verify not a crime: prohibits only failure to "register" or "update," not "verify."

Affirmative Defense
18 USC 2250(b)

D must prove that

(1) uncontrollable circumstances prevented him from complying;

(2) he did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) he complied as soon as such circumstances ceased to exist.

SHERIFF'S OFFICE
COUNTY OF MCKINLEY
2105 E. AZTEC
GALLUP, NEW MEXICO 87301
PH: 505-722-7205 FAX: 505-722-9317

SHERIFF FRANK GONZALES

February 21, 2007

Administrative Office of the United States Courts
Federal Public Defender
111 Lomas NW Suite 501
Albuquerque, NM

RE: [redacted]

To Whom It May Concern:

I was working as the Receptionist for the McKinley County Sheriff's Office during the months of September to February. Not only do I maintain the front desk area, but also help with the Investigative Unit Sex Offender Program by keeping track of appointments and making them on the behalf of the unit. On January 23, 2007, [redacted] came into the MCSO wanting to register as Sex Offender. He did inform me that he was recently released from prison and need to get registered per his Parole Officer. I informed him that the Investigators usually do Sex Offenders registration by appointment on each Tuesday of the month, so I then gave him an appointment slip for January 30, 2007 at 10:00 AM. I did inform him that if he had any trouble making the appointment that he needed to contact the Investigator in charge of handling Sex Offenders. The appointment slip had all the information as to how to contact the MCSO. If you have any other questions, please do not hesitate to call me at (505) 722-7205 ext 3012.

Thank You,

Roxanne Barton
DWI/Grant Secretary

THIRD PRONG CAN BE A TRAP.

DO NOT ADVISE TO REGISTER UNLESS ALL LEGAL AND FACTUAL CHALLENGES HAVE FAILED!!

Statute of Limitations

Adam Walsh I at 8-9

- None for all sex offenses except recordkeeping. 18 USC 3299
- Challenges
  - *Ex Post Facto* Clause if SOL ran before the law was enacted. Stogner v. California, 539 U.S. 607, 611, 617-18 (2003).
  - Equal Protection -- no rational basis for extraordinary unfairness
  - Due Process -- if actual prejudice to defense *and* reason for delay not sufficiently justifiable. United States v. Lovasco, 431 U.S. 783, 789-90 (1979)

Bail Adam Walsh I at 9

- 18 U.S.C. section 3142(c)(1)(B):
  - "any conditions of release" hearing required for any felony not otherwise a COV that involves
    - minor victim
    - possession or use of firearm or destructive device (as defined in 921), or any dangerous weapon (not defined)
    - failure to register as a sex offender under SORNA

Bail Adam Walsh I at 9

- If case involves minor victim and charged under 18 U.S.C. sections 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252(a)(4), 2260, 2421, 2422, 2423, 2425, or 2250

- Then pretrial release order must contain:
  - condition of electronic monitoring
  - each of the conditions at 3142(c)(1)(B)(iv)-(viii) (restrictions on personal associations/place of abode/travel, avoid all contact w/ victim & potential witnesses, regularly report to pretrial services, comply with a curfew, refrain from possessing firearm)

Challenges

- Due process
- Separation of Powers
- Excessive Bail
- Unconstitutional conditions

- Helpful Authority
  - United States v. Salerno, 481 U.S. 739 (1987)
  - United States v. Crowell, 2006 WL 3541736 (WD NY Dec. 7, 2006)
  - 18 U.S.C. section 3142(c)(1)(B): "the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community"
  - United States v. Scott, 450 F.3d 863 (9th Cir. 2006) (requiring consent to warrantless search unconstitutional condition)

Discovery

Adam Walsh I at 10-11

- Material that "constitutes" child porn defined in 18 USC 2256 must "remain in the care, custody, and control of either the Government or the court." 18 U.S.C. § 3509(m).

- Court "shall deny" defense motion to copy, photograph, duplicate or otherwise reproduce, so long as the government provides "ample opportunity for inspection, viewing, and examination."

Argue protective order = "care, custody, and control" of court within meaning of statute.

It's DOJ policy!

January 2007 publication by DOJ's National Institute of Justice, Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors, available at http://www.ncjrs.gov/pdffiles1/nij/211314.pdf.

p. 58, under Discovery by defense:

The use of judicial protective orders or stipulations during the defense's discovery process is strongly advised. When the case has concluded, procedures should be in place for the return of the contraband to the prosecution for digital wiping or destruction.

("Case has concluded" should be read as acquittal, or when all appeals have concluded, and the time for filing 2255 has passed.)

As-applied Constitutional Challenges

- Presumption of innocence
- Separation of Powers
- Due Process & Effective Assistance

- 5th right to assistance of expert. Ake v. Oklahoma, 470 U.S. 68 (1985)
- 6th right to effective assistance. US v. Fabrizio, 341 F.Supp.2d 47 (D. Mass. 2004; US v. Hill, 322 F.Supp.2d 1081 (D.C. Cal. 2004); Westerfield v. Superior Court, 121 Cal.Rptr.2d 402, 404-05 (Cal. App. Ct. 2002)
- 6th right to reasonable investigation. Strickland v. Washington, 466 U.S. 668 (1984)
- Right to privacy in formulating theories and strategy. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); Shillinger v. Haworth, 70 F.3d 1132 (10th Cir.1995); Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990).

United States v. Knellinger

Case No. 06-126 (E.D. Va., Jan. 25, 2007)

- "Ample opportunity" means:
  - Every opportunity required by the Constitution
  - And may also mean more access than what would be mandated by Constitution alone
- "Ample opportunity" not available at government facility
- Government must provide mirror image to defense expert.
- Ian Friedman: ifriedman@inflaw.com
(216) 928-7700

FEDERAL SENTENCING BEFORE *GALL*, WAITING FOR THE OTHER SHOE TO FALL

PRESENTED BY

B. John Burns
Assistant Federal Public Defender

GALL AMICUS BRIEF

* * * * * * *

Sentencing Workshop for Federal Defenders
Los Angeles, California

No. 06-7949

In The Supreme Court of the United States

BRIAN MICHAEL GALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICI CURIAE* OF THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae include all of the Federal Public and Community Defenders in the United States, other than the two representing the petitioners in this matter and in No. 06-6330, *Kimbrough v. United States*. The National Association of Federal Defenders is a nationwide, non-profit organization whose membership includes Federal Public and Community Defenders and their Assistants. Federal Public and Community Defenders have offices in 88 of the 94 federal judicial districts and represent tens of thousands of individuals sentenced in federal court each year. The issue presented in this case is of great importance to our work and the welfare of our clients.

SUMMARY OF ARGUMENT

This Court should reject the extraordinary circumstances test and make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a). If district court judges are permitted to sentence according to the now-governing sentencing law, 18 U.S.C. § 3553(a), with required appellate deference to their sentencing judgments, they can, for the first time, impose sentences that are sufficient, but not greater than necessary, to satisfy sentencing purposes, in light of all relevant statutory factors; provide vital feedback to the Commission which it can use to improve its policies; and

[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *Amici Curiae* made a monetary contribution to the preparation or submission of the brief.

develop a common law of sentencing that is useful and informative to other courts, litigants, and the Commission.

The concept of sentencing reform, as envisioned by early reformers, adopted by Congress, and advocated by the first Sentencing Commission, was of a partnership in which the district courts, particularly through reasoned judgments in sentencing outside the guideline range, would play a pivotal role. The courts of appeals would affirm reasonable departures and synthesize the district courts' reasons, the Commission would learn, and the Guidelines would evolve. This concept was never realized for a number of reasons. The mandatory nature of the Guidelines, their restrictions on individualized sentences, and close appellate scrutiny essentially forbade district courts to consider, and thus they rarely discussed, whether the Guidelines accomplished sentencing purposes, avoided unwarranted disparities, or appropriately took account of individual circumstances. This inhibited the development of a common law of sentencing and the contemplated dialogue between the courts and the Commission.

Following *Booker*, the possibility again arose that the system would reflect and respond to the reasoned judgments of sentencing courts. Since then, however, a majority of the courts of appeals has adopted the extraordinary circumstances test to justify sentences outside the guideline range, which, as before *Booker*, asks whether the sentence is reasonable with regard to the Guidelines, prohibits critical evaluation of Commission policies, and permits courts of appeals to substitute their own judgments for those of the district courts. This method of review again stifles an exchange between the courts and the Commission, bears no resemblance itself to a sentencing common law, discourages the district courts from developing their own sentencing common law, and is now unlawful and unconstitutional.

This Court should now make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a). The district courts are best situated to ensure that the goals of sentencing are met in individual cases, to develop a common law of sentencing, and to provide the Commission with the information it needs to improve its generally applicable advice.

ARGUMENT

I. The Original Intent Was That Sentencing Policy and Practice Would Evolve in Response to the Actions and Views of Sentencing Courts.

One of the chief principles espoused by those who sought to reform sentencing in the 1970s and 1980s was that the courts would adopt a reasoned approach to sentencing, and their work, set forth in reasons for sentences and sentencing opinions, would inform other courts and potentially be incorporated into sentencing guidelines. In the Sentencing Reform Act (SRA), Congress adopted this principle in a number of provisions, and it was embraced by the first Sentencing Commission.

Before the SRA, district court judges were not required to state reasons for their sentencing decisions, and there were virtually no sentencing opinions by district court judges or appellate courts. From the beginning of the movement for a rationalization of sentencing, it was the hope of Marvin Frankel, Norval Morris and other early reformers that judges would state reasons for their sentences and that appellate courts would synthesize those reasons into a consistent body of sentencing jurisprudence. *See* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State*

Experiences, 91 Nw. L. Rev. 1441, 1444-46, 1448 (1997). In this way:

> The courts would have the responsibility . . . for developing a jurisprudential approach to those occasions in which it is appropriate to set guideline presumptions aside. The commission, for its part, would benefit from the ongoing elaboration of such a common law of sentencing. Over time, the substantive principles developed by judges would coexist with, or even be incorporated into, the guidelines themselves.

Id. at 1455.

Congress embraced this principle in several provisions of the SRA. District courts would state their reasons, 18 U.S.C. § 3553(c), the Commission would collect, study and disseminate those reasons, 28 U.S.C. §§ 994(w), 995(a)(15), and appellate courts would uphold "reasonable" departures, having regard for the sentencing court's reasons and the factors set forth in § 3553(a). 18 U.S.C. § 3742(e) (1990). Congress thought that appellate courts would:

> provide case law development of the appropriate reasons for sentencing outside the guidelines. . . . For example, if the courts found that a particular offense or offender characteristic that was not considered, or not adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to amend the guidelines to reflect the factor.

S. Rep. No. 98-225, at 151 (1983).

The original Commission also contemplated that the district courts would provide the feedback through which the Guidelines, which did not resolve every issue at the outset, would evolve. It viewed the initial set of guidelines as "but the first step in an evolutionary process," which

would result from "continuing research, experience and analysis." U.S.S.G. § 1A1.1, pt. A, ¶ 3. Later Commissions could "write and re-write guidelines, with progressive changes," by "monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so." *Id.*, ¶ 4(b). As explained by then-Chief Judge Breyer, "the very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves." *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993). Appellate courts would presumably write opinions placing cases "within a broader perspective of sentencing law." *Id.* at 950.

Thus, from the beginning, one foundation of the reformed system was that appellate courts would synthesize sentencing judges' substantive reasoning into a common law of sentencing, and that this would coexist with, and potentially be incorporated into, the Guidelines. Reitz, *supra*, at 1455.

II. Before *Booker*, The Intent That Decisions of Sentencing Judges Would Contribute to a Sentencing Common Law and Evolution of the Sentencing Guidelines Was Not Fulfilled.

Due to the mandatory nature of the Guidelines, policies adopted by the Commission, and close appellate review enforcing the Guidelines, a common law of sentencing did not develop, and productive dialogue between the courts and the Commission was largely missing.

Though judges were always nominally directed to impose sentences in compliance with § 3553(a), at the same time, they were required to impose the guideline

sentence, whether or not it complied with § 3553(a), unless the facts happened to fit a departure as defined and approved by the Commission, or there was a circumstance not adequately considered by the Commission in formulating its guidelines, policy statements or official commentary. 18 U.S.C. § 3553(b)(1) (2004).

Further reducing the possibility of the courts influencing the development of the Guidelines, the Commission severely narrowed the district courts' discretion to consider the adequacy of the Guidelines. The Commission classified as never or not ordinarily relevant all history and characteristics of the offender other than criminal history, and either did not mention, narrowly defined, or limited the impact of mitigating circumstances of the offense. *See* U.S.S.G. Ch. 5, pts. H, K. p.s.; U.S.S.G. § 3B1.2. Even though the Guidelines could not possibly take into account all factors that are relevant to individual sentencing decisions,[2] the Commission nevertheless placed a wide range of mitigating factors off limits, a decision that was both contrary to congressional intent and unexplained.[3] This decision effectively pre-empted the courts' ability to consider what factors might properly constitute grounds for mitigation of sentence.

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[2] U.S.S.G. § 1A1.1, pt. A ¶ 4(b); U.S. Sentencing Comm'n, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003).

[3] The Commission was directed to consider the relevance of a variety of offender characteristics, 28 U.S.C. § 994(d), and to reflect the "general inappropriateness of considering" education, vocational skills, employment record, family ties and community ties "in recommending a term of imprisonment or length of a term of imprisonment." 28 U.S.C. § 994(e). Congress explained that the purpose of § 994(e) was "to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties," but "each of these factors," in § 994(d) and (e), "may play other roles in the sentencing decision." S. Rep. No. 98-225, at 175 (1983).

Further, the "statutory injunction to uphold 'reasonable' departure sentences ... receded far into the distance." Reitz, *supra*, at 1468. When judges imposed sentences outside the guideline range for reasons not explicitly encouraged in the Guidelines' policy statements, including the failure of a particular guideline to satisfy sentencing purposes, the courts of appeals quickly reined them in. *See, e.g., United States v. Tucker*, 386 F.3d 273, 277 (D.C. Cir. 2004) ("To the extent the district court based the departure on its belief that the sentence was unjust, it relied on a factor that is clearly impermissible under the Guidelines."); *In re Sealed Case*, 292 F.3d 913, 916 (D.C. Cir. 2002) ("Disproportionality does not, in itself, provide an appropriate basis for a downward departure."); *United States v. Goff*, 20 F.3d 918, 922 (8th Cir. 1994) (Heaney, J., dissenting) (by rejecting district court's reliance on defendant's family ties and responsibilities, majority "pull[s] another plank from beneath district judges, mandating that they swim in the sea of the guidelines, instructing them that any attempt to reach higher ground and exercise their informed judgment about the facts of a defendant's life will be frustrated by this court.").[4]

[4] Appellate courts commonly trumped the judgments of the district courts through "spectacles of dueling discretion," in which "the circuit court often recognized that the 'kinds' of factors cited by the sentencing court were supportive of departure, but decided that their 'degree' was not," and "applied their own instincts as to the placement of the case on a continuum." Reitz, *supra*, at 1467-68; *see also* Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L.J. 2043, 2048, 2050-51 (1992) ("Both the Commission and the courts of appeals should be responding more positively to the pressures from trial judges to increase their authority to mitigate."); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 25-26, 78-84 (2003) (hereinafter *"Reason Behind the Rules"*) ("Departure in cases where the Guidelines result in disproportionate punishment, or inadequate or excessive incapacitation, provides

(Continued on following page)

Thus, the efforts of sentencing courts to provide feedback to the Commission about which guidelines were in need of revision were thwarted, and their views had no discernible impact on the Commission's policy choices.[5] By all accounts, including that of the Commission, the ideal model of policy development envisioned in the SRA was never fully implemented, and the goals of sentencing reform have been, at best, partially achieved. *See* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 142-46 (2004); Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker, 38 Ariz. St. L.J. 425, 450 (2006) (hereinafter *"Immediate and Long-Term Effects"*); Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis,* 105 Colum. L. Rev. 1315 (2005); Linda Drazga Maxfield, U.S. Sentencing Comm'n, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines* ES2-7 (Mar. 2003).

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feedback to the Commission about which guidelines are most in need of revision [but] many appellate courts have opted to enforce [the Guidelines] more rigidly than anyone predicted or than the relevant statutes appear to require.").

[5] The Commission mentioned appellate decisions reviewing departures in only five of nearly 700 amendments. *See* U.S.S.G., App. C, amends. 602 (forbidding post-sentencing rehabilitation), 582 (narrowing diminished capacity), 603 (narrowing aberrant behavior), 604 (permitting departure based on conduct that was dismissed or not charged as part of a plea agreement), 645 (permitting departure based on discharged term of imprisonment).

III. After *Booker*, Aggressive Appellate Review of Sentences Outside the Guideline Range Again Forecloses the Possibility of District Court Feedback to the Commission, Discourages Development of a Sentencing Common Law, and Is Now Unlawful and Unconstitutional.

With this Court's decision in *Booker*, the possibility arose that the district courts, which now for the first time were unambiguously required to impose sentences sufficient, but no greater than necessary, to satisfy sentencing purposes in light of all relevant circumstances, would be able to engage in critical evaluation of the Guidelines and that this might lead to their improvement.[6] This potential is being nipped in the bud, however, by an aggressive form of review that is indistinguishable from the *de novo* standard excised by *Booker*.

This method of review asks not whether the sentence is reasonable with respect to § 3553(a), *Booker*, 543 U.S. at 261, but whether it is reasonable with respect to the

[6] *See* Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 Stan. L. Rev. 217, 230 (2005) (noting historical inability of district courts to critically evaluate guidelines, but after *Booker*, "review conducted by individual judges as they consider the particular cases before them . . . could produce, as others have advocated in the past, a 'common law' of sentencing"); Judge Nancy Gertner, *Thoughts on Reasonableness*, 19 Fed. Sent. Rep. 165, 2007 WL 1296012, *5 (2007) (Guidelines should be "critically evaluated in each case . . . for their fealty or lack of fealty to the purposes of sentencing [with] the reasons carefully spelled out."); Douglas A. Berman, *Tweaking* Booker: *Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 375 (2006) (*Booker*'s "remedial opinion, by emphasizing the provisions of § 3553(a) and essentially demanding a sentencing process focused on the exercise of reasoned judgment by federal judges . . . creat[es] the possibility of developing a purpose-driven 'common law of sentencing' . . . which means that judges now can and must give more sustained attention to the broader goals of sentencing reform.").

Guidelines, and defers not to the record findings of sentencing judges, *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007), but to the assumed findings of the Commission. This intrusive standard impedes the Commission's ability to learn from the district courts' experience, *United States v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989), and discourages the development of a useful, healthy and transparent common law. *United States v. Williams*, 481 F. Supp. 2d 1298, 1301-02 (M.D. Fla. 2007).

In those circuits applying the extraordinary circumstances test, appellate courts have simultaneously required virtually no explanation for within-guideline sentences and rejected even the most detailed justifications for non-guideline sentences, thereby "discouraging the development of individualized, policy-driven sentences where the facts so warrant," Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence after* Booker, 18 Fed. Sent. Rep. 174, 2007 WL 1895180, *5 (2006), just as before *Booker*. Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: the Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93, 105 (1999) ("Appellate judges have principally sought to ensure compliance with the Commission's guideline determinations.").

Just as the mandatory nature of the Guidelines before *Booker* hindered judicial evaluation of the substance of the Guidelines, the extraordinary circumstances test does the same. As one district court judge observed, it "sounds very much like the old departure standard" and "improperly elevates the guidelines above the other factors set forth in section 3553(a)." *United States v. Cull*, 446 F. Supp. 2d 961 (E.D. Wis. 2006). Indeed, the decisions of courts of appeals under this standard are fundamentally indistinguishable from the pre-*Booker* regime, for they routinely reverse on the ground that the district judge's reason is discouraged,

prohibited or not recognized by Commission policy and is therefore absolutely not permitted or is not sufficiently "extraordinary" to overcome that obstacle. *See, e.g., United States v. Richardson*, No. 05-4817, 2007 WL 1413075, *2 (4th Cir. May 11, 2007) (defendant's prior good character, lack of criminal record and influence of relationship with principal conspirator were "not so extraordinary as to support" non-guideline sentence, and reliance on factors Commission deemed "not ordinarily relevant" (youth) or "not appropriate" (post-sentence rehabilitation) was "misplaced"); *United States v. Borho*, 485 F.3d 904, 912-13 (6th Cir. 2007) (district court must offer "compelling justification" if factors discouraged by guidelines form basis of "substantial variance" from guideline range); *United States v. Funk*, 477 F.3d 421, 427-31 (6th Cir. 2007) (disagreement with career offender guideline as applied to nature and circumstances of defendant and offense is "an impermissible sentencing factor"); *United States v. Simmons*, 470 F.3d 1115, 1130-31 (5th Cir. 2006) (court must "explain why the prohibited or discouraged factor, as it relates to defendant, is so extraordinary that the policy statement should *not* apply.") (emphasis in original); *United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006) ("we do not share the district court's view that [defendant's] charitable works were so extraordinary that they should be given weight despite the contrary view of the Sentencing Commission"); *United States v. Wallace*, 458 F.3d 606, 611 (7th Cir. 2006) (judge's stated belief "that culpability should be measured by actual loss . . . was not an appropriate consideration, as the guidelines have already made the judgment that intended loss is what counts"); *United States v. Ture*, 450 F.3d 352, 358-59 (8th Cir. 2006) (reversing sentence to probation, in part, because "[t]he Court's logic does not convince us that [defendant's] age and health are so extraordinary that they eliminate the need for imprisonment"). Further, in

applying this standard, the courts of appeals substitute their own judgments for those of the district courts as to findings of fact, *United States v. Davis*, 458 F.3d 491, 502 (6th Cir. 2006) (Keith, J., dissenting), the weight to be given the facts, *United States v. Cage*, 451 F.3d 585, 595 (10th Cir. 2006), and the appropriate sentence. *United States v. Thurston*, 456 F.3d 211, 220 (1st Cir. 2006). This has rendered illusory the discretion of district courts to apply the standards of § 3553(a) to the cases before them, has stymied judicial evaluation of whether the Guidelines are consistent with § 3553(a) in operation, and defeats any serious possibility that sentencing principles developed by district courts might ultimately be recognized in the Guidelines.

By forbidding district courts to disagree with any Commission policies, a majority of the courts of appeals would end, before it has begun, the discussion whether those policies further the goals of § 3553(a). *See* Carissa Byrne Hessick & Andrew Hessick, Rita, Claiborne, *and the Courts of Appeals' Attachment to the Sentencing Guidelines*, 19 Fed. Sent. Rep. 171, 2007 WL 1296013, *5 (2007) (discussing appellate courts' "insistence that sentences not be based on a sentencing court's disagreement with policy decisions of the Guidelines or on facts that might affect sentences of more than a small number of defendants"); *United States v. Pruitt*, 487 F.3d 1298, 1314-15 & n.3, 1317-18 (10th Cir. 2007) (McConnell, J., concurring) (explaining that appellate courts' role is not to ensure that the guidelines reflect good policy, but to affirm guideline sentences even when the policy reflected therein is "misguided," and to reverse district courts' stated disagreements with admittedly "misguided" Commission policies, because Congress entrusted policy questions to the Commission). In short, as before *Booker*, the appellate courts have created a "veto over trial court innovations" that leaves little room for district court discretion or "the

human element of sentencing decisions," "chok[ing] off" the very jurisprudence Congress and the first Commission expected would enable the system to evolve. *See* Reitz, *supra*, at 1455, 1458, 1471; *see also Rita*, 127 S. Ct. at 2469; *id.* at 2482-83 (Scalia, J., concurring).

Moreover, this position effectively restores mandatory Guidelines and the accompanying Sixth Amendment violation. It forbids a judge to increase, or decrease, a sentence unless the judge finds facts not found by a jury or admitted by the defendant. *Rita*, 127 S. Ct. at 2466. It does not allow a non-guideline sentence based on a conclusion that the guideline sentence, as a matter of policy, fails to reflect § 3553(a) considerations or reflects an unsound judgment, or that a different sentence is appropriate "regardless." *Id.* at 2465, 2468; *see also Cunningham v. California*, 127 S. Ct. 856, 862-70 (2007) (sentencing system that does not permit sentencing increase based on "general objectives of sentencing" alone without a "fact-finding anchor" violates the Sixth Amendment). As the government has conceded, to avoid the Sixth Amendment violation, judges must be free to disagree with the guidelines, even when the case is typical,[7] that is, in the absence of extraordinary facts.

A statistical comparison illustrates that limiting district court discretion to sentence outside the guideline range, absent extraordinary circumstances, effectively restores mandatory Guidelines and recreates the Sixth Amendment violation. In circuits that do not use the extraordinary circumstances test (District of Columbia, Second, Third, and Ninth circuits), non-guideline sentences were reversed as unreasonable in only 5.9% of

[7] Transcript of Oral Argument at 32-33, *Claiborne v. United States*, No. 06-5618 (U.S. argued Feb. 20, 2007); Transcript of Oral Argument at 50, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007).

cases. Appeals courts employing the extraordinary circumstances test (First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh circuits), reversed three times more often, holding 18.8% of non-guideline sentences unreasonable. The Eighth Circuit, which reversed Mr. Gall's sentence, reversed non-guideline sentences 35.1% of the time.[8]

The impact of the extraordinary circumstances test on sentences imposed by district court judges is apparent. According to recent Commission statistics, the rate of non-guideline sentences imposed by judges in extraordinary circumstances circuits is 34.9% less than in non-extraordinary circumstances circuits,[9] demonstrating the "substantial gravitational pull" that "in practical terms preserve[s] the very feature of the Guidelines that threatened to trivialize the jury right." *Rita*, 127 S. Ct. at 2487 (Souter, J., dissenting); *see also id.* at 2473 (Stevens, J., concurring); *id.* at 2478 n.3 (Scalia, J., concurring).

In short, the requirement that there be extraordinary circumstances to permit a sentence outside a guideline range and that such a sentence may not be based upon disagreement with Commission policy forecloses the

[8] *See* Appendix. These statistics were compiled from the data contained in the Court of Appeals Review, filed as an Appendix to the Brief *Amici Curiae* of the Federal Public and Community Defenders and the National Association of Federal Defenders in Support of Petitioners, *Rita v. United States*, Case No. 06-5618 and *Claiborne v. United States*, Case No. 06-5754 (Dec. 18, 2006).

[9] Of the 23,212 sentences imposed in extraordinary circumstances circuits, 2,847, or 12.3%, were outside the guideline range (not including government-sponsored below-guideline sentences). Of the 9,355 sentences imposed in non-extraordinary circumstances circuits, 1,553, or 16.6%, were outside the guideline range (not including government-sponsored below-guideline sentences). *See* U.S. Sentencing Comm'n, *Preliminary Quarterly Data Report*, 2d Quarter Release, Through March 31, 2007, Table 2.

possibility of feedback by district courts to the Commission, discourages development of a sentencing common law, and is both unlawful and unconstitutional under *Booker* and *Rita*.

IV. Requiring Deference to District Courts' Application of § 3553(a) to Individual Cases Will At Last Permit the Development of a Sentencing Common Law and a Dialogue with the Commission.

The essential component of a system that *can* produce sentences that meet the purposes of sentencing, avoid unwarranted disparities, and take account of individual circumstances, and that *can* evolve over time, is the ability of district court judges to impose non-guideline sentences within the framework of § 3553(a), to explain those sentences, and to have their judgments respected.

District court judges can fulfill this uniquely vital role now that they are no longer required, or permitted, to defer to the Commission's policy judgments, *Rita*, 127 S. Ct. at 2465, and appellate courts may no longer "grant greater factfinding leeway to [the Commission] than to a district judge." *Id.* at 2463. After an independent evaluation, the judge may conclude that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," "the Guidelines reflect an unsound judgment, or . . . do not generally treat certain defendant characteristics in the proper way," or "the case warrants a different sentence regardless." *Id.* at 2465, 2468. In explaining why, the judge can provide valuable information to the Commission, other judges, and also importantly to the defendant. *See Immediate and Long-Term Effects*, *supra*, at 464 ("Many sentencing judges engage in thoughtful consideration of the Commission's guidelines and policy statements, as well as the statutory factors found at 18 U.S.C. § 3553(a), and

appellate courts [because they] must make a refined assessment of the many facts bearing on the outcome, informed by [their] vantage point and day-to-day experience in federal sentencing." *Koon*, 518 U.S. at 98. *Accord Pruitt*, 487 F.3d at 1318 (McConnell, J., concurring) (role of appellate courts "cannot be to ensure that the sentence is properly calibrated to the particular circumstances of the offender and the offense. District judges, who interact with the defendant and hear the evidence in the case, are far better situated than appellate judges to make these judgments.").

District court judges are better-situated than appellate courts to determine whether "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or whether "the Guidelines reflect an unsound judgment." *Rita*, 127 S. Ct. at 2465, 2468. This too is a fact-bound determination within the special competence and experience of the district courts. It requires the finding and weighing of facts particular to the offense and the offender, and broader purpose-related facts as well, such as the statistical likelihood of recidivism of persons of the defendant's age, educational level and work history, the deterrent value and societal cost of lengthy prison sentences for the type of offense, the community's view of the seriousness of the offense,[10] the efficacy of substance abuse or other mental health treatment. *See, e.g., United States v. Brennan*, 468 F. Supp. 2d 400, 404-08 (E.D.N.Y. 2007); *United States v. Holden*, No. 06-20345, 2007 WL 1712754 (E.D. Mich. June 13, 2007); *United States v. Nellum*, Crim. No. 2:04-30, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005); *United States v. Perella*, 273 F. Supp. 2d 162 (D. Mass. 2003). The question is not amenable to "the normal law-clarifying benefits that come from an appellate decision on

[10] 28 U.S.C. § 994(c)(4), (5).

a question of law," as the answer depends on a "diffuseness of circumstances." *Pierce*, 487 U.S. at 561-62. Further, district courts can better identify persistent problems with the Guidelines, *see, e.g., United States v. Ibanga*, 454 F. Supp. 2d 532 (E.D. Va. 2006) (relevant conduct rules as applied to acquitted conduct "run[] afoul of the statutory sentencing factors set forth in 18 U.S.C. § 3553(a)"); *United States v. Saenz*, 429 F. Supp. 2d 1081 (N.D. Iowa 2006) (describing massive disparities routinely arising from U.S.S.G. § 5K1.1), because they see so many more cases than appellate courts do. *Koon*, 518 U.S. at 98; U.S. Sentencing Comm'n, *2006 Sourcebook of Federal Sentencing Statistics*, Tables 2 and 55 (88.6% of sentences imposed by district courts were not appealed).

Judges can make findings based on expert testimony and reports, criminological research, health and sociological studies. They are no longer confined to consulting only the guidelines, policy statements and official commentary of the Commission to determine whether a circumstance was "adequately taken into consideration" such that a departure is warranted, 18 U.S.C. § 3553(b)(1) (2004), but must conduct their *own* assessments in discharging their statutory duties under § 3553(a). *See also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").[11] As trial judges whose daily

[11] *Williams v. New York*, 337 U.S. 241, 246 (1949) ("Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").

function is to hear and evaluate evidence, they are well-positioned to consult pertinent research and studies and to assess the validity and relevance of such studies in light of the facts of the case and their extensive sentencing experience.

The Commission itself has conducted studies that have not been incorporated into the Guidelines but upon which judges can and should rely. In addition to the reports on crack cocaine sentencing,[12] the Commission's *Fifteen Year Report* identifies serious problems with the career offender guideline, the relevant conduct rules, the drug guidelines generally, and various forms of disparity that have increased under the Guidelines, most notably racial disparity and hidden disparities caused by the government's practices as permitted and encouraged by the Guidelines.[13] It has published three reports on recidivism, acknowledging that the criminal history rules were never based on empirical evidence and identifying numerous factors that predict reduced recidivism which are not included in the Guidelines and factors that do not predict recidivism which are included in the Guidelines.[14] While

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[12] With one possible exception, *United States v. Pickett*, 475 F.3d 1347 (D.C. Cir. 2007) (district court erred in neglecting to consider Commission's findings), the courts of appeals have restricted the ability of district courts to rely on the Commission's findings in its crack cocaine reports. *United States v. Willis*, 479 F. Supp. 2d 927, 933-35 (E.D. Wis. 2007) (discussing appellate case law regarding use of Commission's crack reports and their impact on sentencing under § 3553(a)).

[13] U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 47-55, 76, 82, 91, 94, 102-06, 111-15, 117, 122, 131-35, 140-42 (2004).

[14] U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "*Measuring Recidivism*"); U.S. Sentencing Comm'n, *Recidivism and the First Offender* (May 2004); U.S. Sentencing

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the rules remain unchanged, judges can and should rely on these extra-guideline findings to impose non-guideline sentences that better comply with § 3553(a).[15]

There are many areas, highly relevant to sentencing purposes, in which the Commission has not collected or conducted research, but in which significant research is available from other sources. Examples include studies on brain development by the National Institutes of Health and others, as cited by the district court in this case,[16] research showing the efficacy and cost savings of drug treatment, education and job training over lengthy

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Comm'n, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005).

[15] *See United States v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (relying on *Fifteen Year Report*'s discussion of career offender guideline to impose non-guideline sentence); *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007) (relying on *Fifteen Year Report* to point out disparities arising from government's unilateral power to reward cooperation, contrasting restrictions on aberrant conduct guideline with recidivism reports); *United States v. Martinez*, Crim. No. 99-40072, 2007 WL 593629 (D. Kan. Feb. 21, 2007) (notifying counsel considering non-guideline sentence based, in part, on defendant's age, referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, Crim. No. 04-1146-03, 2006 WL 1311982 (S.D.N.Y. May 10, 2006) (noting several courts have imposed non-guideline sentences for defendants over 40 based on markedly reduced recidivism, citing recidivism study); *United States v. Ali*, Crim. No. 1:05-5, 2006 WL 1102835 (E.D. Va. Apr. 17, 2006) (imposing non-guideline sentence, citing recidivism reports).

[16] Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Science 105-09 (June 2004) (reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (study shows "that the region of the brain that inhibits risky behavior is not fully formed until age 25").

incarceration in reducing crime,[17] reports from the Department of Justice and others showing that lengthy prison terms are being served by too many offenders with little risk of recidivism and without deterrent value,[18] research on the adverse impact of incarceration on children and families,[19] analyses of the suitability of members

[17] Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself?"*, 41 Health Services Res. 192-213 (2006) (for every $1 spent on drug treatment, $7 is saved in general social savings, primarily in reduced offending and also in medical care); Stephen J. Morse, *Addiction, Genetics and Criminal Responsibility*, 69 Law & Contemp. Probs. 165, 205 (2006) ("The criminal justice system response should be limited and reformed to enhance the potential efficacy of treatment approaches."); Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, Vera Institute of Justice, January 2007 (discussing diminishing returns of increased incarceration on crime rate and cost effectiveness of investment in education and employment).

[18] U.S. Dep't of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (Feb. 1994), *available at* http://www.fd.org/pdf_lib/1994%20DoJ%20study%20part%201.pdf; The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), *available at* http://www.sentencingproject.org/pdfs/incarceration-crime.pdf; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (1999); Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (1994).

[19] Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: Effects of Parental Incarceration on Young Children* (Dec. 2001), presented at U.S. Dep't of Health and Human Services National Policy Conference, "From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities" (2002) (discussing impact of parental incarceration on children and benefits of alternatives to incarceration); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk Factors for Delinquency: An Overview* (2001) (discussing link between aggression, drug abuse, and delinquency in children to several factors, including separation from parents); The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing

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of immigrant populations for intermediate sanctions,[20] reports on the efficacy of victim mediation as an alternative to incarceration,[21] and studies demonstrating that contrary to myth, recidivism rates for sex offenders are lower than in the general criminal population, and that community treatment for sex offenders is effective.[22]

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effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."); Patricia M. Wald, *"What About the Kids?": Parenting Issues in Sentencing*, 8 Fed. Sent. Rep. 137, 1995 WL 862004 (1995) (discussing growing body of research showing that children fare better in their parents' care than in foster care or elsewhere).

[20] Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 338, 353 (2005).

[21] Nancy Lucas, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 Hofstra L. Rev. 1365 (2001) (explaining ancient concept of "restorative justice" as alternative to incarceration, citing numerous studies examining its effectiveness in criminal context); *see also, e.g.*, James Bonta et al., *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Report No. 1998-05, Solicitor General of Canada (Oct. 1998) (collecting studies regarding restorative justice and reporting that offenders participating in victim and community reconciliation program rather than being incarcerated were more likely to make restitution to victims and generally had significantly lower recidivism rates), *available at* http://ww2.ps-sp.gc.ca/publications/corrections/pdf/199810b_e.pdf.

[22] U.S. Dep't of Justice, Bureau of Justice Statistics, Office of Justice Programs, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003) (finding sex offenders had lower overall rearrest rate compared to non-sex offenders and no clear association between length of incarceration and recidivism rates); U.S. Dep't of Justice, Center for Sex Offender Management, Office of Justice Programs, *Myths and Facts About Sex Offenders* (Aug. 2000) (discussing recidivism rates and finding that treatment costs far less than incarceration); F.S. Berlin, *A Five-Year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcomes*, 12 Am. J. of Forensic Psych. 3 (1991) (documenting effectiveness of community treatment for sex offenders).

Thus, district judges can inform the Commission of issues it has not identified, help it to understand issues it has not resolved, and alert it to issues it may have thought were closed. For example, after *Booker*, district courts have informed the Commission that the career offender guideline (from which the Guidelines permit a departure of only one level) fails to distinguish between serious and non-serious offenses by substantially reducing career offender sentences in many cases.[23] In *United States v. Ennis*, 468 F. Supp. 2d 228, 234 & n.11 (D. Mass. 2006), the judge pointed out that the definition of career offender predicates covers misdemeanor convictions, contrary to 28 U.S.C. § 994(h), from states with misdemeanors punishable by more than one year. In *United States v. Quinn*, 472 F. Supp. 2d 104, 111 (D. Mass. 2007), the judge identified a "structural problem" in the relevant conduct rule as shown by two different probation officers "calculating" ranges of 37-46 months and 151-188 months for two identically-situated defendants in the same case. In *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006), the judge explained how calculations under the fraud guideline based on unintended loss and various overlapping adjustments resulted in a "patently absurd" life sentence. *United States v. Gener*, Crim. No. 04-424-17, 2005 WL 2838984

[23] *See* U.S. Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 137-40 (Mar. 2006); *see, e.g., United States v. Person*, 377 F. Supp. 2d 308 (D. Mass. 2005); *United States v. Hubbard*, 369 F. Supp. 2d 146, 148 (D. Mass. 2005); *United States v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va. 2005); *United States v. Serrano*, Crim. No. 04-424, 2005 WL 1214314, at **7-9 (S.D.N.Y. May 19, 2005); *United States v. Carvajal*, Crim. No. 04-222, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005). *But see United States v. Moreland*, 366 F. Supp. 2d 416 (S.D. W. Va. 2005) (reducing 360-month career offender sentence to 120 months under § 3553(a)), *rev'd*, 437 F.3d 424 (4th Cir. 2006) (vacating and remanding for imposition of sentence of no less than 240 months under extraordinary circumstances test).

*5 (S.D.N.Y. Oct. 26, 2005) illustrated the problem with including juvenile adjudications with a sentence of 60 days or more in the criminal history score where the juvenile offense is trivial and the length of confinement results not from the gravity of the offense but family circumstances and special needs. This kind of feedback is invaluable because it results from concrete, living contests between adversaries which sharpen and focus the issues, *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20-21 (1998); *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 382-83 (1980), whereas thorough adversarial testing does not occur at the rulemaking level. *See* Stith & Dunn, *supra* note 6; Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U. L.Q. 1199 (1999); Samuel J. Buffone, *The Federal Sentencing Commission's Proposed Rules of Practice and Procedure*, 9 Fed. Sent. Rep. 67, 1996 WL 931745 (1996).

District court judges are also better-equipped than appellate courts to avoid unwarranted disparities, first because they see so many more cases, and second, as Congress recognized at the outset, because judges are "able to make informed comparisons between the case at hand and others of a similar nature . . . after a comprehensive examination of the characteristics of the particular offense and the particular offender." S. Rep. No. 98-225, at 52-53 (1983). Today, judges can make such comparisons based not only on the cases they sentence, but on sentences imposed by other judges as well. *See, e.g., United States v. Boyden*, No. 06-20243, 2007 WL 1725402 (E.D. Mich. June 14, 2007) (concluding that the guideline sentence would not avoid unwarranted disparity based on review of state and federal sentences in Michigan for similar and more serious conduct). Judges have access to confidential information on the precise sentencing reasons and statistics for all judges in their district. *See Richardson v.*

United States, 477 F. Supp. 2d 392, 402-05 (D. Mass. 2007). They can and do consult Commission statistics, Commission studies, and studies by other experts in order to impose sentences that avoid unwarranted disparities. *See, e.g., United States v. Miranda-Garcia*, Crim. No. 6:05-202, 2006 WL 1208013 (M.D. Fla. May 4, 2006); *United States v. Belvett*, Crim. No. 6:04-199, 2005 WL 852649 (M.D. Fla. Mar. 17, 2005).

This case illustrates both how a district court judge can contribute valuable information to the Commission by analyzing factors that the Commission treats narrowly in a more nuanced way through the prism of section 3553(a), and how the extraordinary circumstances test stifles the development and flow of useful information. The Guideline Manual deems age as "not ordinarily relevant." U.S.S.G. § 5H1.1. However, as the district court noted, the Commission has published a study, not reflected in the Manual, finding that recidivism rates drop as age increases. *United States v. Gall*, 374 F. Supp. 2d 758, 762 n.2 (S.D. Iowa 2005). The study shows that the recidivism rate for offenders under age 21 is 35.5%, that it drops to 31.9% for offenders age 21-25 (Mr. Gall's age at the time of the offense), and that it drops dramatically to 23.7% for offenders age 26-30 (his age at the time of sentencing). *See Measuring Recidivism*, *supra* note 14, at 28, Exhibit 9. What the Commission's study does not explain is *why* recidivism drops with age. One reason, according to research by the National Institutes of Health cited by the district court judge, is that the region of the brain that inhibits risky behavior is not fully formed until age 25. *Gall*, 374 F. Supp. 2d at 762 n.2. This was relevant to Mr. Gall's moral culpability as he committed the offense when he was 21, and was relevant to his current risk of recidivism at age 26. Pursuant to extraordinary circumstances review, the court of appeals deemed the study an

"improper factor." *United States v. Gall*, 446 F.3d 884, 890 (8th Cir. 2006).

Another example is the way in which the district court treated Mr. Gall's drug and alcohol addiction. The Guidelines forbid consideration of this circumstance. U.S.S.G. § 5H1.4. However, consistent with its view that prison is not an appropriate means of promoting rehabilitation, 18 U.S.C. § 3582(a), Congress suggested that the Commission might recommend that a drug dependent defendant be placed on probation in order to participate in a community drug treatment program. S. Rep. No. 98-225, at 173. Here, Mr. Gall's addiction to drugs and alcohol helped to explain his criminal activity, he was waging a successful battle against it, and the district court made treatment a condition of his probation. *Gall*, 374 F. Supp. 2d at 762, 763 n.4. As another district court judge has explained:

> The status of being addicted has an ambiguous relationship to the defendant's culpability. It could be a mitigating factor, explaining the motivation for the crime. It could be an aggravating factor, supporting a finding of likely recidivism. Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. Cal. L. Rev. 367, 385 (1992). On the other hand, the relationship between drug rehabilitation and crime is clear. If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. In fact, statistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison setting. Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002).

Perella, 273 F. Supp. 2d at 164. The court of appeals gave no weight to this factor.

Finally, the district court gave considerable weight to aspects of Mr. Gall's conduct and character in ways the Guidelines fail to recognize, *i.e.,* his voluntary withdrawal from the conspiracy, completion of his college degree, employment and successful operation of his own business. The judge viewed Mr. Gall's financial profit from the offense from two relevant perspectives: On the one hand, he profited and therefore should be punished; on the other, though he had few financial resources, he turned his back on what was for him a highly profitable venture. These circumstances gave the district court great confidence that he would not recidivate and was not a danger to society. 374 F. Supp. 2d at 762-64. Under the Guidelines, sentences for drug offenses are driven by quantity, which, as in this case, often overstates the seriousness of the offense and overrides other, more relevant, circumstances.[24] To the extent the Guidelines can be said to recognize withdrawal from a conspiracy, it is only by excluding drug quantities the defendant did not agree to distribute in any event. U.S.S.G. § 1B1.3, comment. (n.2). And, although the Commission has found that education and employment predict greatly reduced recidivism, *Measuring Recidivism*, *supra* note 14, at 12, the Guideline Manual deems those

[24] According to Paul J. Hofer, the Commission's Senior Research Associate, "the original Commission clearly preferred objective factors, such as drug weight or dollar amount, to subjective ones," but the result "is that important moral questions of culpability are relatively neglected, while more easily quantifiable issues of harm are elevated to a significance and exactitude beyond their worth. Even former Commissioners have noted that requiring judges to determine the exact amount of drugs or monetary loss involved in an offense gives the Guidelines a false precision." *Reason Behind the Rules*, *supra* note 4, at 70-71 (citing Stephen Breyer, *Federal Sentencing Guidelines Revisited,* 11 Fed. Sent. Rep. 180, 1999 WL 730985 (1999)).

factors "not ordinarily relevant." U.S.S.G. §§ 5H1.2, p.s., 5H1.5, p.s.

Each of the district court's careful findings could provide valuable insight to the Commission and to other judges if permitted to stand. The court's analysis might suggest to the Commission that it collect and study pertinent research on brain development, and current research on the relationships among addiction, crime, treatment and recidivism. *See* 28 U.S.C. § 991(b)(1)(C) (directing Commission to ensure that sentencing policies and practices reflect advancement in knowledge of human behavior). It might suggest that, even on the wholesale level, the guidelines could recognize that quantity should not predominate over others factors with a greater bearing on sentencing purposes. The court of appeals, however, substituted its own judgment for that of the district court, finding that the district court (1) "gave too much weight to Gall's withdrawal from the conspiracy" because he "benefited" by not being sentenced under a later, more severe guideline (which would have violated the *Ex Post Facto* Clause) or for drug quantities distributed by others after he withdrew (which would have violated the Guidelines' definition of relevant conduct), (2) "did not properly weigh the seriousness of Gall's offense," citing the effects on health of using ecstasy which presumably explain why the drug is illegal, and (3) "placed too much emphasis on Gall's post-offense rehabilitation" because probation "lies outside the limited range of choice dictated by the facts of the case." *Gall*, 446 F.3d at 889-90.

This is not a common law of sentencing that is useful to other judges or the Commission. It undermines the quality and transparency of sentencing and prevents the Guidelines from evolving. As one judge recently observed,

while grappling with a remand based on his having mentioned his discomfort with the 100:1 crack-to-powder-cocaine sentencing ratio:

> The natural result of this will be to shield the guidelines from judicial scrutiny and to stifle the development of sentencing law. The Sentencing Commission will receive little meaningful input from district judges who, being on the front lines of sentencing issues but without a personal or professional stake in their outcome, are among those best able to provide objective, informed analysis.

Williams, 481 F. Supp. 2d at 1301-02; *see also United States v. Williams*, 472 F.3d 835, 847 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc) ("the panel opinion has the perverse effect of discouraging district court judges from stating the reasons for imposing sentence – the less they say, the less that can be used as a basis to reverse them.").

CONCLUSION

This Court should reverse the judgment of the Eighth Circuit, and make clear that, whether the sentence is inside or outside the advisory guideline range, the court of appeals must defer to the sentencing court's assessment of the facts and its judgment as to the appropriate sentence under § 3553(a), and may not engage in the aggressive review that most courts of appeals are now using. This will finally permit the kind of dialogue between sentencing

courts and the Commission, and among the courts, that was intended at the beginning.

Respectfully submitted,

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APPENDIX

RATIO OF REVERSALS FOR OUTSIDE-GUIDELINE SENTENCES

	All Circuits	Non-Extraordinary Circumstances Circuits Only[1]	Extraordinary Circumstances Circuits Only[2]
Outside Guideline Sentences	76 / 485 reversed (15.7 %)	7 / 118 reversed (5.9 %)	69 / 367 reversed (18.8 %)

RESULTS BY CIRCUIT

DISTRICT OF COLUMBIA: 0% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	0	0	Above Guideline	0	0
Below Guideline	0	0	Below Guideline	0	0

FIRST CIRCUIT: 41.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	2	1	Above Guideline	0	0
Below Guideline	5	0	Below Guideline	0	4

[1] The District of Columbia and the Second, Third, and Ninth Circuits have not adopted an "extraordinary circumstances" test for non-guideline sentences.

[2] The First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have adopted an "extraordinary circumstances" test for non-guideline sentences.

SECOND CIRCUIT: 6.7% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	14	0	Above Guideline	0	0
Below Guideline	13	0	Below Guideline	1	2

THIRD CIRCUIT: 2.8% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	15	0	Above Guideline	0	0
Below Guideline	20	0	Below Guideline	0	1

FOURTH CIRCUIT: 24.1% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	23	2	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	0	11

FIFTH CIRCUIT: 10.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	54	1	Above Guideline	0	0
Below Guideline	3	1	Below Guideline	0	5

SIXTH CIRCUIT: 14.3% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	14	3	Above Guideline	0	0
Below Guideline	12	0	Below Guideline	4	2

SEVENTH CIRCUIT: 17.9% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	13	0	Above Guideline	0	0
Below Guideline	8	0	Below Guideline	2	5

EIGHTH CIRCUIT: 35.1% reversal rate

Defendant Appeals Sentence	Sentence Affirmed	Sentence Reversed	Government Appeals Sentence	Sentence Affirmed	Sentence Reversed
Above Guideline	30	1	Above Guideline	0	0
Below Guideline	18	0	Below Guideline	2	26

EIGHT DRAFT MODEL SENTENCING OBJECTIONS

(Compiled by the SRC Project as a working draft for Redondo Sentencing Seminar; Revised 9/11/07)

I. CRACK CASES:

A. [CLIENT] objects to the 100:1 crack/powder ratio reflected in the Guidelines as excessive, unfair and unreasonable.

Although counsel acknowledges the [Third] Circuit's ruling in [*United States v. Ricks*, __F.3d __, 2007 WL 2068098 (3d Cir. 2007)],[1] that district courts may not, as a matter of policy, reject the 100:1 crack/powder cocaine ratio that is incorporated into the Sentencing Guidelines, [CLIENT] wishes to preserve an objection to this Court's use of those Guidelines in determining a sentence for [CLIENT] in light of the Supreme Court's cert grant in United States v.

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[1] *See United States v. Pho*, 433 F.3d 53, 64 (1st Cir. 2006) ("[W]e hold that the district court erred as a matter of law when it constructed a new sentencing range based on the categorical substitution of a 20:1 crack-to-powder ratio for the 100:1 ratio embedded in the sentencing guidelines."); *United States v. Castillo*, 460 F.3d 337, 358 (2d Cir. 2006) (holding that district courts may not "impose a different ratio as a policy matter"); *United States v. Ricks*, __F.3d ___, 2007 WL 2068098, 2007 U.S. App. LEXIS 17258 (3d Cir. July 20, 2007) ("[D]istrict courts may not categorically reject the 100-to-1 ratio."); *United States v. Eura*, 440 F.3d 625, 634 (4th Cir. 2006) (stating that it "wholeheartedly agrees" with the First Circuit that the categorical rejection of the 100-to-1 ratio is impermissible); *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007) ("Rejecting the 100:1 ratio because a court disagrees with congressional sentencing policy is not a substitute for applying the essential considerations of § 3553(a)."); *United States v. Caver*, 470 F.3d 220, 249 (6th Cir. 2006) (rejecting argument that the 100:1 ratio is categorically unreasonable and stating that for the appellate court "to declare a portion of the Sentencing Guidelines unreasonable under all circumstances" would require "exercising legislative power . . . [that] *Booker* does not authorize"); *United States v. Jointer*, 457 F.3d 682, 687 (7th Cir. 2006) ("A district court simply cannot substitute its own ratio for the 100:1 ratio."); *United States v. Spears*, 469 F.3d 1166, 1176 (8th Cir. 2006) (*en banc*) ("[N]either *Booker* nor § 3553(a) authorizes district courts to reject the 100:1 quantity ratio and use a different ratio in sentencing defendants for crack cocaine offenses."); *United States v. McCullough*, 457 F.3d 1150, 1172 (10th Cir. 2006) (citing statements in *Pho* and *Eura* prohibiting the categorical rejection of the 100-to-1 ratio and stating that it "agree[s] with "this authority"); *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006) ("Congress concluded the 100-to-1 ratio is justified, and the courts have no authority to change that.").

Kimbrough, No. 06-6330, which presents the question whether, in carrying out the mandate of 18 U.S.C. section 3553(a), the district court may consider the impact of the ratio and the Sentencing Commission's recommendations regarding it..

In *Rita v. United States*, the Supreme Court made clear that a defendant may "contest[] the Guidelines sentence generally under § 3553(a)" by "argu[ing] that the Guidelines reflect an unsound judgment," 127 S. Ct. 2456, 2468 (2007), and the Sentencing Commission has repeatedly made clear that the 100:1 crack-to-powder ratio contained in the Guidelines reflects such an unsound judgment. *See, e.g.*, U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, at 8 (May 2007) ("[T]he 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act."). Given that the crack-powder calibration is not required by statute and is not justified by the Commission, science, or reason, application of the crack guidelines in this case would result in a sentence that undermines the congressional directives set forth in 18 U.S.C. § 3553(a) and be "virtually indefensible." *See United States v. Pruitt*, 2007 U.S. App. LEXIS 12872 n.3 (June 4, 2007) (McConnell, J., concurring); *see also Ricks*, __ F.3d at ___ ("There is little disagreement that the 100-to-1 ratio overrepresents the relative harm of crack as compared to powder cocaine.").

B. Application of the crack guidelines in this case results in a "greater than necessary" sentence.

Even accepting the crack Guidelines generally, as [*Ricks*] says we must, the disparity reflected in the Guidelines range as applied to [CLIENT] in particular results in a sentence that is "greater than necessary" to effectuate the goals of 18 U.S.C. § 3553(a) and results in

"unwarranted sentence disparities" in violation of § 3553(a)(6). [*See Ricks*, __ F.3d at ___, 2007 WL 2068098 at *25-26; *see also United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) ("[D]istrict courts may consider the crack/powder cocaine differential in the Guidelines as a factor . . . in the post-*Booker* sentencing process.")].[2] As the Supreme Court made clear in Rita, the sentencing court may hear such arguments that a guidelines sentence should not apply "because [it] fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007) [Insert here analysis demonstrating why the guidelines are unfair *in this case* given in the Sentencing Commission's reports. Language on some of the common reasons is given below.]

(1) Low-level offender

"Most crack cocaine offenders receiving sentences greater than five years are low-level street dealers. For no other drug are such harsh penalties imposed on such low-level offenders. High penalties for relatively small amounts of crack cocaine appear to be misdirecting federal law enforcement resources away from serious traffickers and kingpins toward street-level retail dealers." United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of*

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[2] *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006) ("[W]e do not intend . . . to suggest that, in a drug-trafficking case, the nature of the contraband and/or the severity of a projected guideline sentence may not be taken into account on a case-by-case basis."); *United States v. Castillo*, 460 F.3d 337, 356, 361 (2d Cir. 2006) ("To be sure, when sentencing a defendant for a crack-related crime - as with any other crime - a district court judge may consider the judge's own sense of what is a fair and just sentence under all the circumstances." (internal quotation marks omitted)); *United States v. Caver*, 470 F.3d 220, 249 (6th Cir. 2006) ("[A] departure from the 100:1 ratio may well be reasonable in a particular case."); *United States v. Jointer*, 457 F.3d 682, 687 (7th Cir. 2006); *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006).

Sentencing Reform, at 132 (2004). This is precisely what occurred in [CLIENT]'s case. [INSERT FACTS HERE.]

(2) No aggravating conduct

In 1986, when Congress instituted the 100:1 ratio for statutory mandatory minimums, one of the primary reasons offered for the differential was an assumption that high levels of violence were associated with crack cocaine trafficking; likewise, it was widely assumed that many crack cocaine offenses involved distribution to minors or pregnant women. These assumptions, however, have proven unfounded. *See* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at vi, vii, 91, 94-96 (May 2002). Moreover, they are not present in [CLIENT]'s case. [INSERT FACTS HERE.]

(3) Client is African-American or other minority

As the Sentencing Commission has concluded, "The 100-to-1 . . . ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants." U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 163 (Feb. 1995); *see also* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at 102-03 (May 2002) ("2002 Report"); U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, at 8, 15 (May 2007) ("The current severity of crack cocaine penalties mostly impacts minorities."). Even though the drug guideline is not designed deliberately to sentence minorities more harshly, the fact remains that it does in practice when crack cocaine cases are at issue. That will occur here, in [CLIENT]'s case. The practice of meting out punishment that is harsher to one group than another corrodes belief in

equal justice under the law. *See* 2002 Report at 103. This Court should therefore consider reducing [CLIENT]'s sentence to reduce the disparity.

C. The Court should grant a two-level reduction in [CLIENT]'s offense level to account for the Sentencing Commission's forthcoming "partial remedy" to the disparity.

In May 2007, the Commission issued its fourth report, reiterating its conclusion that the crack cocaine guidelines exaggerate the harmfulness of crack, sweep too broadly to include low-level offenders, overstate the seriousness of most crack-related crimes, and disproportionately affect minorities. *See* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007) ("2007 Report"). In conjunction with this report, the Commission recommended that Congress approve an amendment implementing a two-level reduction in crack cocaine offense levels. *See* U.S. Sentencing Comm'n, *Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2007*, 72 Fed. Reg. 28,558 (2007). According to the Commission, the amendment, scheduled to go into effect on November 1, 2007, is "neither a permanent or complete solution." *See id.* Still, some remedy is better than none.

Although the amendment is has not yet been implemented or made retroactive, it may nonetheless be considered in deciding whether and how much to sentence below the guideline range. Indeed, several circuits have found – both in the context of departures and variances – that a change in the guidelines implemented after a defendant's offense may be a "benchmark" by which to gauge the appropriateness of a defendant's sentence. *See United States v. Johnson*, 427 F.3d 423, 428 (7th Cir. 2005); *see also United States v. Shortt*, 485 F3d 243, 250 (4th Cir. 2007) ("Our conclusion that the . . . variance . . . was reasonable is reinforced by the Sentencing

Commission's current judgment about the same offense . . . .") *United States v. Sriram*, 482 F.3d 956, 962 (7th Cir. 2007) ("[C]urrent guidelines can be used to help guide a judge who is minded to sentence the defendant outside the applicable guidelines range."); *United States v. Larrabee*, 436 F.3d 890, 893 (8th Cir. 2006) ("[W]e also find persuasive the amendments to the sentencing guidelines which became effective on November 1, 2004, subsequent to the date of Larrabee's offense."); *United States v. Rainone*, 32 F.3d 1203, 1208 (7th Cir. 1994) ("[A] subsequent amendment is an appropriate guide for a departure."); *United States v. Harotunian*, 920 F.2d 1040, 1047 (1st Cir. 1990) (approving court's use of amendments "for partial guidance").[3] In keeping with this logic, this Court should reduce [CLIENT]'s offense level by two.

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[3] In these cases, the courts looked to proposed or subsequent amendments to impose *higher*, not lower, sentences. Although their reasoning makes sense when imposing a lower sentence, the Third Circuit recently recognized that applying a subsequent amendment to *increase* a sentence violates the *ex post facto* clause, *see United States v. Wood*, 486 F.3d 781, 790-91 (3d Cir. 2007).

II. CAREER OFFENDER CASES

A. [When prior offenses are drug trafficking convictions:]

Sentencing [CLIENT] as a career offender is not an accurate measure of the risk of recidivism or the need for deterrence and overstates the seriousness of [CLIENT]'s prior offenses.

Because [CLIENT]'s prior convictions are for drug crimes only, application of the career offender provision in U.S.S.G. § 4B1.1 in this case would result in an extraordinary increase in [CLIENT's] sentence that is not necessary to protect the public from future crimes [and vastly overstates the seriousness of his prior offenses]. The Commission itself has recognized that the Career Offender guideline unfairly penalizes drug offenders, who are less likely than other offenders to commit future crimes:

> Preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other offenders who are assigned to criminal history Category VI . . . . The recidivism rate for career offenders more closely resembles the rates for offenders in the lower criminal history categories in which they would be placed under the normal criminal history scoring rules in Chapter Four of the Guidelines Manual. The career offender guideline thus makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses."

U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 134 (2004).

A non-Career Offender sentence in [CLIENT]'s case, by the Commission's own admission, is sufficient but not greater than necessary to implement the sentencing goals outlined in § 3553(a), including effectively promoting the need to protect the public from future crimes.

[When client is African-American:]

The inclusion of mere drug offenders within the ambit of the Career Offender guideline also disparately impacts African-American offenders. African-American offenders constituted 26 percent of offenders sentenced under the guidelines in 2000, but were 58 percent of offenders sentenced under the career offender provision, due mostly to the "inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline." *Id.* at 133. Such would be the case here, as [CLIENT] is an African American drug offender. Sentences evincing this type of racial disparity are contrary to § 3553(a) as they promote disrespect for the law.

B. [When the prior drug offense is not specified in 28 U.S.C. § 994(h):]

Sentencing [CLIENT] without regard to the Career Offender guideline better reflects the Congressional intent underlying 28 U.S.C. § 994(h) because [CLIENT]'s crime of conviction is not among those enumerated in the legislation.

Moreover, excluding [CLIENT] from Career Offender consideration actually better reflects Congressional intent. In 28 U.S.C. § 994(h), Congress directed the Commission to provide punishment at or near the statutory maximum for a defendant convicted of a "felony" that is "described in" 21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. App. 1901 *et seq.* Congress intended that such sentences apply to "repeat violent offenders and repeat drug traffickers." S. Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

The Commission exceeded that statutory directive by including crimes not specified by Congress in § 994(h), including [CLIENT's crime of conviction –][export, conspiracy, attempt, possession of a flask or equipment with intent to manufacture under 21 U.S.C. § 843(a)(6)] [maintaining a place for the purpose of facilitating a controlled substance offense under 21 U.S.C. § 856] [use of a communications facility in committing or facilitation a controlled substance offense under 21 U.S.C. § 843(b).] U.S.S.G. § 4B1.2(b) & comment. (n.1). Particularly in view of the Commission's critiques of the Career Offender guideline, the court

should hew closely to Congress's directive and impose a non-Career Offender sentence in this case.

C. [When prior offense is a crime of violence that involved no injury or actual violence:]

Because [CLIENT]'s prior conviction involved no injury or actual violence, its treatment as a Career Offender predicate is not justified.

The Commission's definition of "crime of violence" in § 4B1.2(a) is unnecessarily broad. Without an element of physical force and applying to offenses that involve only a "serious potential risk of physical injury to another," the Commission's definition sweeps in defendants such as [CLIENT] whose prior conduct involved no actual violence or actual injury to another person. Not only was this broad definition adopted without any reasoned justification, *see* U.S.S.G. App. C, amend. 268 (Nov. 1, 1989), the Commission's continued use of this definition in the absence of empirical studies demonstrating that [CLIENT's prior offense] actually carries a "serious potential risk of physical injury to another" reflects "unsound judgment"and should not be followed here. *See Rita v. United States,* 127 S. Ct. 2456, 2468 (2007).[4]

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[4]*See* 28 U.S.C. § 991(b)(1)(C) (requiring the Commission to develop Guidelines that will "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"); *id.* § 994(o) (directing the Commission to "review and revise" the guidelines "in consideration of comments and data coming to its attention"). At oral argument in *James v. United States*, 127 S. Ct. 1586 (2007), the Justices expressed interest in the percentage of cases in which someone actually was injured in an attempted burglary in order to determine whether the offense "presents a serious potential risk of physical injury to another." Justice Breyer noted that the Commission has a "mandate" to collect such data and that the career offender guideline includes attempted burglary. He said he "hoped" the Commission "did get [the data] before coming to the conclusion they did." *See* Transcript of Oral Arg. at 18-19, *James v. United States*, 127 S. Ct. 1586 (2007) (No. 05-9264), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-9264.pdf.

Potentially useful post-*Booker* career offender cases:

- *United States v. Williams*, 435 F.3d 1350, 1352-53 (11th Cir. 2006) (upholding a downward variance where the defendant's instant offense involved distribution of five grams of crack cocaine and his prior convictions were for possession of cocaine with intent to deliver and carrying a concealed firearm, concluding that application of the career offender provision would "not promote respect for the law and [was] way out of proportion to the seriousness of the offense and to [the defendant's] criminal prior conduct").

- *United States v. Moreland*, 437 F.3d 424, 437 (4th Cir. 2006) (rejecting the downward variance in that case, but suggesting that circumstances in another case could be "so compelling as to warrant the maximum possible downward variance, *i.e.*, the imposition of the statutory mandatory minimum sentence").

- *United States v. Fernandez*, 436 F. Supp. 2d 983, 984 (E.D. Wis. 2006) ("Because this case presented an example of how the career offender guideline can conflict with the purposes of sentencing under 18 U.S.C. § 3553(a), I . . . imposed a non-guideline sentence that better served those purposes.").

- *United States v. Person*, 377 F. Supp. 2d 308, 310 (D. Mass. 2005) (departing downward from a guidelines range of 262-327 months because the career offender status "grossly overstated" the seriousness of defendant's criminal history).

- *United States v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va. 2005) (where relatively minor prior offenses occurred when the defendant was seventeen years old, concluding that "a due regard for the 'history and characteristics of the defendant'" and the fact that the career offender classification depends on "close distinctions that do justify an enhanced sentence here" required a departure from the career offender guideline).

- *United States v. Qualls*, 373 F. Supp. 2d 873, 877 (E.D. Wis. 2005) (concluding that a career offender sentence for a cocaine dealer with a long criminal history, which was "nearly 10 times higher than any previous, unrelated sentence, and nearly twice the applicable range, was greater than necessary," and thus imposing a below-Guidelines sentence).

- *United States v. Phelps*, 366 F. Supp. 2d 580, 590 (E.D. Tenn. 2005) ("[I]t is not unusual that the technical definitions of 'crime of violence' and 'controlled substance offense' operate to subject some defendants to not just substantial, but extraordinary increases in their advisory Guidelines ranges. In some of these cases, the Court believes a non-Guidelines sentence may be sufficient, but not greater than necessary, to both comply with Congress's desire to punish recidivism and the purposes of sentencing set out in § 3553(a)(2).").

$ *United States v. Carvajal*, No. 04-CR-222, 2005 U.S. Dist. LEXIS 3076, 2005 WL 476125, at *5-6 (S.D.N.Y. Feb. 22, 2005) (departing from career offender range of 210 to 262 months and imposing a sentence of 168 months because the higher range was "excessive, in light of [defendant's] recidivism, for the Guidelines Career Offenders are the same regardless of the severity of the crimes, the dangers posed to victims' and bystanders' lives, and other appropriate criteria").

III. IMMIGRATION CASES

A. Increasing [CLIENT]'s sentence based on proof by a preponderance of the evidence violates the Sixth Amendment right to trial by jury.

Although counsel acknowledges the Third Circuit's decisions in [*United States v. Ordaz*, 398 F.3d 236 (3d Cir. 2005), and *United States v. Coleman*, 451 F.3d 154 (3d Cir. 2006)] holding, based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a judicial finding by a preponderance of the evidence of the existence of a prior conviction that raises the statutory maximum does not violate the Sixth Amendment, [CLIENT] wishes to preserve an objection on this point, given the Supreme Court's continued emphasis on the application of the Sixth Amendment to federal sentencing. *See, e.g., Shepard v. United States*, 544 U.S. 13, 27-28 (Thomas, J., concurring) (*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided . . . . [I]n an appropriate case, this Court should consider *Almendarez-Torres'* continuing viability.") (citations omitted).

B. The absence of a fast-track program in this district creates unwarranted disparity and warrants a reduction in [CLIENT]'s sentence.

Additionally, while acknowledging the [Third] Circuit's decision in [*United States v. Vargas*, 477 F.3d 94 (3d Cir. 2007)],[5] holding that the absence of a fast-track program in this

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[5]See *United States v. Martinez-Trujillo*, 468 F.3d 1266, 1268 (10th Cir. 2006) ("We cannot say that a disparity is 'unwarranted' within the meaning of § 3553(a)(6) when the disparity was specifically authorized by Congress in the PROTECT Act."); *United States v. Mejia*, 461 F.3d 158, 163 (2d Cir. 2006) ("Congress expressly approved of fast-track programs without mandating them; Congress thus necessarily decided that they do not create the unwarranted sentencing disparities that it prohibited in Section 3553(a)(6)"); *United States v.*

district does not create unwarranted disparity, [CLIENT] wishes to preserve an objection on this point in view of the Supreme Court's recent grant of *certiorari* in *United States v. Kimbrough*, No. 06-6330, which raises the question what constitutes an unwarranted disparity, and/or in anticipation of a future grant of *certiorari* on the fast-track issue itself.

C. The Court should reduce [CLIENT]'s sentence because his conviction for [offense] did not warrant an enhancement for "crime of violence" under § 2L1.2(b)(1)(A)(ii).

Although [CLIENT's] prior conviction for [insert offense here] technically qualifies for an enhancement as a "crime of violence" under § 2L1.2, the circumstances of that offense were relatively benign and did not involve [any physical harm] [the level of risk of harm] that might warrant such an enhancement. [Insert description of offense]. A sentence within the guidelines

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Aguirre-Villa, 460 F.3d 681, 683 (5th Cir. 2006) ("Congress must have thought the disparity warranted when it authorized early disposition programs without altering § 3553(a)(6)"); *United States v. Castro*, 455 F.3d 1249, 1252 (11th Cir. 2006) ("When Congress directed the Sentencing Commission to allow the departure for only participating districts . . . [it] implicitly determined that the disparity was warranted."); *United States v. Perez-Pena*, 453 F.3d 236, 243 (4th Cir. 2006) ("Sentencing disparities between defendants receiving fast-track downward departures under the PROTECT Act and those not receiving such departures are 'warranted' as a matter of law"); *United States v. Marcial-Santiago*, 447 F.3d 715, 718 (9th Cir. 2006) ("In light of Congress's explicit authorization of fast-track programs in the PROTECT Act, we cannot say that the disparity between Appellants' sentences and the sentences imposed on similarly-situated defendants in fast-track districts is 'unwarranted.'"); *United States v. Martinez-Martinez*, 442 F.3d 539, 542 (7th Cir. 2006) ("Given Congress' explicit recognition that fast-track procedures would cause discrepancies, we cannot say that a sentence is unreasonable simply because it was imposed in a district that does not employ an early disposition program."); *United States v. Sebastian*, 436 F.3d 913, 916 (8th Cir. 2006) (explaining "Congress and the President, by directing that the Sentencing Commission provide for guideline departures in certain judicial districts, concluded that the advantages stemming from fast-track programs outweigh their disadvantages, and that any disparity that results from fast-track programs is not 'unwarranted.'") (internal quotation and citation omitted). *But see United States v. Ossa-Gallegos*, 453 F.3d 371, 375-76 (6th Cir. 2006), *aff'd on rehearing*, 491 F.3d 537 (6th Cir. 2007) (en banc) (in illegal reentry case, approving as "reasonable" a two-level downward variance based on unwarranted disparity caused by the absence of fast-track policy).

range in this case would result in a sentence that is disproportionately severe and not reasonably related to [CLIENT's] culpability for the instant offense.

Potentially useful post-*Booker* immigration cases:

- *United States v. Hernandez-Castillo*, 449 F.3d 1127, 1132 (10th Cir. 2006) (noting the propriety of a downward variance in the context of the overbroad "crime of violence" definition in § 2L1.2).

- *United States v. Trujillo-Terrazas*, 405 F.3d 814, 817, 819-20 (10th Cir. 2005) (noting the propriety of a downward variance where a defendant's prior "arson" conviction -- the circumstances of which were "innocuous"--technically qualified for an enhancement under § 2L1.2(b)(1)(A)(ii)).

IV. ACQUITTED OR UNCHARGED CONDUCT

A. To satisfy the Fifth Amendment, use of acquitted and/or uncharged conduct requires proof beyond a reasonable doubt.

While acknowledging the [Third Circuit's decision in *United States v. Grier*, 475 F.3d 556 (3d Cir. 2006) (*en banc*)],[6] holding that the right to proof beyond a reasonable doubt under the Fifth Amendment does not apply to [acquitted] [uncharged] conduct that serves to increase a sentence under the advisory guidelines, [CLIENT] wishes to preserve an objection on this point point given the Supreme Court's continued emphasis on the requirement of proof beyond a reasonable doubt for facts used to increase sentences beyond those authorized by the jury verdict or guilty plea. *See United States v. Booker*, 543 U.S. 220, 240 & n.6 (2005) (emphasizing that *Watts* was a case narrowly addressing the use of acquitted conduct and the double jeopardy provision of the *Fifth Amendment* and that the issue presented in *Booker* had not been presented in *Watts*); *id.* at 319 n.6 (2005) (Thomas, J., dissenting in part) (indicating that the majority in *Booker* corrected the Commission's "mistaken" belief reflected in the commentary to U.S.S.G. § 6A1.3 that use of a preponderance of the evidence standard at sentencing is appropriate); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) ("[U]nder the *Due Process Clause of the Fifth Amendment* . . . any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable

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[6] *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006) (neither Fifth nor Sixth Amendment violated); *United States v. Gobbi*, 471 F.3d 302 (1st Cir. 2006) (*Watts* survives *Booker*); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005) (*Watts* survives *Booker*); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006) (same); *United States v. Barton*, 455 F.3d 649, 657-58 (6th Cir. 2006); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005) (same); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006) (even after *Booker* acquitted conduct can be considered); *United States v. Okai*, 454 F.3d 848, 852 (8th Cir. 2006); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005) (same); *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005) (same).

doubt."); *see also Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) (in addressing Sixth Amendment issue, also recognizing that "'such facts must be established by proof beyond a reasonable doubt.'" (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)); *Blakely v. Washington*, 542 U.S. 296, 231 (2004) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt.")

Where, as here, [the jury has acquitted [CLIENT] of [offense as charged in Count XX]] [the conduct at issue is uncharged], the Court may not rely make findings by a preponderance of the evidence regarding that conduct to increase [CLIENT]'s sentence without violating the Due Process Clause of the Fifth Amendment. [*Alternative in the case of a cross-reference*: In this case, the advisory Guidelines instruct the Court to increase [CLIENT's] sentence based on uncharged conduct through the application of [applicable guideline cross-reference] and based on a preponderance of the evidence. This instruction violates the Fifth Amendment's guarantee that no one will be punished for a criminal offense except upon proof beyond a reasonable doubt.]

B. Judicial factfinding of acquitted conduct to increase the sentence violates the Sixth Amendment.

While acknowledging the [Ninth Circuit's decision in *United States v. Mercado*, 474 F.3d 654 (9th Cir. 2007)],[7] holding that under the advisory sentencing scheme, the Sixth Amendment

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[7] *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006); *United States v. Gobbi*, 471 F.3d 302 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Hayward*, 177 Fed. Appx. 214, 215 (3d Cir. 2006); *United States v. Ashworth*, 139 Fed. Appx. 525, 527 (4th Cir. 2005) (per curiam); *United States v. Farias*, 469 F.3d 393, 399-400 (5th Cir. 2006); *United States v. Brika*, 487 F.3d 450, 459 (6th Cir. 2007); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. High Elk*, 442 F.3d 622, 626 (8th

does not prevent a sentencing judge from increasing a sentence up to the statutory maximum based on conduct for which the defendant was acquitted by the jury, [CLIENT] wishes to preserve an objection on that point given the Supreme Court's continued emphasis on the Sixth Amendment's requirement that any fact (other than a prior conviction) used to increase a sentence must be authorized by the jury verdict or guilty plea. *See United States v. Booker*, 543 U.S. 220, 240 & n.4 (emphasizing that *United States v. Watts*, 519 U.S. 148 (1997), addressing a narrow *Fifth Amendment* issue regarding the use of acquitted conduct for sentencing purposes, did not consider whether the *Sixth Amendment* was violated by reliance of acquitted conduct at sentencing); *id.* at 251 (Breyer, J.) (treating *Watts* as severely limited because *Watts* "assumed that this system [of mandatory guideline sentencing] would continue"); *Blakely v. Washington*, 542 U.S. 296, 231 (2004) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt."); *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) ("'[I]t is unconstitutional for a legislature to remove from the jury the assessment o facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'"(quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)); *Jones*, 536 U.S. at 243 n.6 ("[U]nder the . . . jury trial guarantees of the *Sixth Amendment*, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

Cir. 2006); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir. 2005); *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005).

V. USE OF PRIOR CONVICTION TO ENHANCE SENTENCE

Permitting proof of a prior conviction by preponderance of the evidence to raise the statutory maximum violates the Sixth Amendment.

Although counsel acknowledges the [Third] Circuit's decisions in [*United States v. Ordaz*, 398 F.3d 236 (3d Cir. 2005), and *United States v. Coleman*, 451 F.3d 454 (3d Cir. 2006)], holding, based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a judicial finding by a preponderance of the evidence of the existence of a prior conviction that raises the statutory maximum does not violate the Sixth Amendment, [CLIENT] wishes to preserve an objection on this point, given the Supreme Court's continued emphasis on the application of the Sixth Amendment to federal sentencing. *See, e.g.*, *Shepard v. United States*, 544 U.S. 13, 27-28 (Thomas, J., concurring) (*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided . . . . [I]n an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability.") (citations omitted).

VI. MANDATORY MINIMUMS

In *Harris v. United States*, 536 U.S. 545 (2002), a plurality of the Supreme Court held that *Apprendi* does not apply to findings of facts triggering the mandatory minimum under 18 U.S.C. § 924(c)(1)(A) because those findings do not increase the *maximum* sentence to which the defendant is exposed. 536 U.S. at 565. As Justice Thomas recognized in his dissenting opinion, however, "[w]hether one raises the floor or raises the ceiling, it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). As foreshadowed by Justice Thomas and made clear by subsequent developments in the Court's Sixth Amendment jurisprudence, the continuing viability of *Harris* is doubtful. *See Blakely v. Washington*, 542 U.S. 296, 303(2004) (holding that "facts essential to punishment" must be admitted by the defendant or charged and proven to a jury beyond a reasonable doubt); *Ring v. Arizona,* 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment the defendant receives . . . must be found by a jury beyond a reasonable doubt").

While recognizing the [Ninth] Circuit's decision in [*United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005)],[8] holding that despite the Supreme Court's developing Sixth Amendment jurisprudence, imposition of a mandatory minimum under18 U.S.C. § 924(c) based on facts

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[8]*United States v. Estrada*, 428 F.3d 387, 391 (2d Cir. 2005) ("[W]e are bound by the Supreme Court's rulings in *Almendarez-Torres* and *Harris*"); *United States v. Williams*, 464 F.3d 443, 449 (3d Cir. 2006) (affirming continuing validity of *Harris* after *Booker*); *United States v. Jones*, 418 F.3d 726, 732 (7th Cir. 2005) ("Under *Harris*, which the Supreme Court did not disturb in Booker, imposition of the . . . mandatory minimum sentence for a violation of 924(c)[] . . . did not violate the Sixth Amendment."); *United States v. Duncan*, 413 F.3d 680, 683 (7th Cir. 2005) ("Nothing in *Booker* or *Blakely* suggests that the Court reconsidered, much less

found by the court by a preponderance standard does not violate the Sixth Amendment, [CLIENT] wishes to preserve an objection on this point. As a number of lower court judges have correctly recognized, the Court's post-*Harris* Sixth Amendment appear to undercut *Harris's* holding. *See, e.g., United States v. Groce*, 398 F.3d 679, 682 n.2 (4th Cir. 2005) (acknowledging that sentences pursuant to *Harris* are "problematic" after *Booker*); *United States v. Thompson*, 422 F.3d 1285, 1304 (11th Cir. 2005) (Tjoflat, J., specially concurring) ("Supreme Court precedents upholding mandatory minimums based on extra-judicial findings and extra-verdict enhancements based on prior convictions . . . are now thought by some to be in doubt"); *United States v. Dare*, 425 F.3d 634, 647 (9th Cir. 2005) (Bea, J., dissenting) ("While *Harris* may not be overruled in its entirety, it is limited by *Booker*, and Dare's sentence exceeds the *Booker* limit"); *United States v. Malouf*, 377 F. Supp. 2d 315 (D. Mass. 2005) (court could not base minimum mandatory penalty upon fact that was not alleged in indictment and proved to a jury beyond a reasonable doubt; after *Blakely* and *Booker*, the Sixth Amendment applies to all factors "essential to the punishment;" "the breadth of the holdings in *Booker* and *Blakely* have in fact overruled *Harris*"), *rev'd, United States v. Malouf*, 466 F.3d 21, 26-27 (1st Cir. 2006).

[For firearms characteristics:]

Facts related to firearms characteristics that trigger mandatory minimums under 924(c) must be proven to the jury beyond a reasonable doubt.

While recognizing the [Eleventh Circuit's decision in *United States v. Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007)],[9] holding that the district court could determine firearm

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overruled, its holding in *Harris*."); *United States v. Holyfield*, 481 F.3d 1260, 1263 (10th Cir. 2007).

[9]*United States v. Gamboa*, 439 F.3d 796, 810-12 (8th Cir. 2006) (concluding that the prosecution was not required to show defendant knew firearm was machine gun); *United States v. Cavely*, 318 F.3d 987, 1000 (10th Cir. 2003) ("[A] determination of whether a firearm is a

characteristics that trigger mandatory minimums under § 924(c)(1)(B) without violating the Sixth Amendment, [CLIENT] wishes to preserve an objection on that point in light of the Supreme Court's developing Sixth Amendment jurisprudence. Indeed, in light of recent Supreme Court cases, the Sixth Circuit has held that firearm-type provisions in § 924 triggering mandatory minimums constitute elements that must be proven to the jury beyond a reasonable doubt, *see United States v. Harris*, 397 F.3d 404, 413-14 (6th Cir. 2005), making the issue ripe for review by the high court.

> Because the drug statutes tie increased mandatory minimum *and* maximum sentences together, *Harris* does not apply, and drug amounts triggering increased sentences must be submitted to a jury for determination beyond a reasonable doubt.

Although in *Harris v. United States*, 536 U.S. 545 (2002), the Court held that 18 U.S.C. § 924(c)(1)(A) (a provision which increased the mandatory minimum sentence – but ***not*** the maximum) was consistent with *Apprendi* and the Sixth Amendment, the mandatory provisions in the drug statutes (21 U.S.C. §§ 841, 851) which increase ***both*** the minimum and maximum penalties, are qualitatively different and fit squarely within the rule of *Apprendi* requiring proof to a jury beyond a reasonable doubt.

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prohibited assault weapon under this section is a sentencing factor and not an essential element of the offense that must be proven at trial."); *United States v. Harrison*, 272 F.3d 220, 226 (4th Cir. 2001) ("It makes sense only as a sentencing factor that cabins a judge's discretion when imposing a sentence for the base offense in § 924(c)(1), for which the maximum penalty is life imprisonment."); *United States v. Barton*, 257 F.3d 433, 443 (5th Cir. 2001) ("[W]e join the vast majority of circuits that have reviewed this or a similar issue to conclude that subsections (i), (ii), and (iii) set forth sentencing factors, not separate elements of different offenses."); *United States v. Sandoval*, 241 F.3d 549, 552 (7th Cir. 2001) (same).

VII. USE OF PRESENTENCE REPORT

A. Facts contained in the presentence report, but not admitted by the defendant or proved to a jury beyond a reasonable doubt, may not form the basis for the sentence.

[CLIENT] objects to the use at sentencing of allegations contained in the presentence report that have not been either admitted or proved to a jury beyond a reasonable doubt, but which increase [CLIENT]'s sentence. The Supreme Court's Sixth Amendment jurisprudence mandates that the maximum reasonable sentence is the one authorized by the facts found by the jury or admitted by the defendant in the guilty plea. *Rita v. United States*, __ U.S. __, 2007 WL 1772146 at * 22 (June 21, 2007) ("[F]or every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. Every sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment."); *see also id.* at 2466-67 (Breyer, J.) (acknowledging that some guidelines sentences may violate the Sixth Amendment, though Rita's sentence did not present that problem). Thus, as recommended by Justice Scalia in his concurring opinion in *Rita*, this Court should "ascertain[] what the maximum reasonable sentence is in each case based only on the verdict and appellate precedent," as this is "the only way to eliminate Sixth Amendment problems." *Id.* at * 26 (Scalia, J., concurring and concurring in the judgment); *see also United States v. Griffin*, __ F. Supp. 2d __, 2007 WL 1620526 at * 13-14 (D. Mass June 6, 2007) (implementing this approach).

[Insert discussion of statutory maximum as established by verdict or defendant's admissions at the guilty plea.] Because [the jury made no other factual findings relevant to sentencing,] [[CLIENT] made no other sworn admissions relevant to sentencing,] this Court may not impose a higher sentence.

Even if this Court rejects Justice Scalia's recommended approach to avoiding constitutional infirmities, [CLIENT] objects to the reliance on the presentence report without a full evidentiary hearing on each and every allegation that the Court plans to consider in imposing sentence. The brief and untested allegations in the presentence report, standing alone, do not bear sufficient indicia of reliability to support this Court's sentencing decision. *See United States v. Littlesun*, 444 F.3d 1196, 1199 (9th Cir. 2006) (permitting reliance by sentencing courts on hearsay, but only if evidence bears sufficient indicia of reliability); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005) (same); *see also United States v. Martinez*, 413 F.3d 239, 242 (2d Cir. 2005) (further emphasizing that "[t]he Due Process Clause is plainly implicated at sentencing, even though it does not require at sentencing all the procedural safeguards and strict evidentiary limitations of the criminal trial itself. (internal quotation marks omitted)); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005) ("Sentencing judges are entitled to use any procedures adequate to reach informed and accurate decisions in the main." (internal quotation marks omitted)).

B. <u>The criminal history allegations in the Presentence Report that derive from sources other than jury verdicts or guilty pleas must be excised and may not be relied upon by the Court because they are not sufficiently reliable.</u>

[CLIENT] objects to the inclusion in the Presentence Report of criminal history allegations deriving from police reports, including those allegations in paragraphs [List]. Under *Shepard v. United States*, 544 U.S. 13 (2005), such documents are not sufficiently "conclusive" to support factual findings about the nature of the prior conviction. *Id.* at 1262. Although *Shepard* involved a predicate conviction under Armed Career Criminal Act that would have increased the statutory maximum sentence, its reasoning applies equally well here. Police reports are not reliable indicators of criminal history compared to "the charging document, the

terms of a plea agreement or transcript of colloquy between judge and defendant, or to some comparable judicial record.." *Id.* [Discuss any indicia of unreliability of the allegations in your case.]

As the Court is aware, even where the Court does not intend to rely on the allegations to increase the instant sentence, criminal history allegations have significant sentencing implications that warrant *Shepard*-like scrutiny of those allegations under [BOP policy] [the Adam Walsh Act]. [Discuss the implications in your case.]

To the extent that the Court is disinclined to excise the allegations and/or plans to rely upon them, [CLIENT] requests a full evidentiary hearing on each of the allegations to test their reliability. *Cf. United States v. Littlesun*, 444 F.3d 1196, 1199 (9th Cir. 2006) (permitting reliance by sentencing courts on hearsay, but only if evidence bears sufficient indicia of reliability); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005) (same); *see also United States v. Martinez*, 413 F.3d 239, 242 (2d Cir. 2005) (further emphasizing that "[t]he Due Process Clause is plainly implicated at sentencing, even though it does not require at sentencing all the procedural safeguards and strict evidentiary limitations of the criminal trial itself. (internal quotation marks omitted)); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005) ("Sentencing judges are entitled to use any procedures adequate to reach informed and accurate decisions in the main." (internal quotation marks omitted)).

VIII. UNSOUND JUDGMENT BY USSC

Guideline does not reflect sound judgment by the Commission:

[*Attack an individual guideline based on its legislative history -- absence of reasons or justification or supporting data.*]

In *Rita v. United States*, the Supreme Court made clear that sentencing courts are free to consider whether a particular guideline reflects "unsound judgment" by the Commission. 127 S. Ct. 2456, 2468 (2007). [Demonstrate that [the applicable guideline here] reflects unsound judgment and should not be followed.]

EXAMPLES:

- **Any unstudied guideline**: The Commission is charged with conducting studies before implementing or amending a guideline. *See* 28 U.S.C. § 991(b)(1)(C) (requiring the Commission to develop Guidelines that will "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"); *id.* § 994(o) (directing the Commission to "review and revise" the guidelines "in consideration of comments and data coming to its attention").

- **Attempted burglary / crime of violence:** At oral argument in *James v. United States*, 127 S. Ct. 1586 (2007), the Justices expressed interest in the percentage of cases in which someone actually was injured in an attempted burglary in order to determine whether the offense "presents a serious potential risk of physical injury to another." Justice Breyer noted that the Commission has a "mandate" to collect such data and that the career offender guideline includes attempted burglary. He said he "hoped" the Commission "did get [the data] before coming to the conclusion they did."[10] Yet, the Commission has never collected or studied any data to determine that attempted burglary or any other offense that does not fall within § 4B1.2(a)(1) and is not enumerated in § 4B1.2(a)(2) nonetheless empirically presents a serious potential risk of physical injury to another because it actually results in injury in a significant number of cases.

- **Escape, failure to report / crime of violence:** *See United States v. Chambers*, 473 F.3d 724, 727 (7th Cir. 2007) ("The Sentencing Commission, or if it is unwilling a criminal

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[10]*See* Transcript of Oral Arg. at 18-19, *James v. United States*, 127 S. Ct. 1586 (2007) (No. 05-9264), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-9264.pdf.

justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report and return. . . . Some disaggregation [of forms of escape] seems indicated, but to do it sensibly we judges need data.").

- **Aberrant behavior:** *See, e.g.*, *United States v. Germosen*, 473 F. Supp. 2d 221, 227 (D. Mass. 2007) (discussing the continuous absence of study or rationale behind U.S.S.G. § 5K2.20, which limits departures for "aberrant behavior").

- **Firearms trafficking:** Without conducting any study on the matter, the Commission adopted a "trafficking" enhancement for firearms offenses knowing that its broad terms would sweep in defendants who are not really "traffickers." See Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After* United States v. Booker, at 42-43 (Aug. 2006), *available at* http://www.fd.org/pdf_lib/EvansStruggle.pdf. Although one Commissioner expressed his theory that judges would give "a break" to defendants on a case-by-case basis,[11] this expectation appears in neither the guideline nor the commentary to it.

- **Firearm with an obliterated serial number:** The Commission increased the enhancement for a firearm with an obliterated serial number from two to four levels despite having been informed that its initial reason published for comment was contradicted by law enforcement practice. *See id.* at 46. The final amendment was published without addressing the contrary information and including an additional reason that was never published for comment or raised by any witness in a public document or hearing, see id., illustrating the structural failure of the Commission's rulemaking process to join relevant issues at the relevant time so that they can be thoroughly tested before a guideline is promulgated. *Cf.* S. Rep. No. 98-225, at 180-81 (1984) (envisioning a Commission that would adhere to "more extensive procedures than required by Section 553, at an earlier stage in the process of guideline development, to acquaint itself fully on the issues involved in the promulgation of specific guidelines"). "Such procedure invites arbitrariness and error" into the rulemaking process. *Cf. Panetti v. Quarterman*, 551 U.S. ____, slip op. at 1-17 (June 28, 2007) (internal quotation marks omitted) (referring to flawed state court procedures requiring no deference in federal habeas proceedings).

- **Drug offenses and "dangerous handling" of a substance:** Congress directed the Commission to determine whether sentences for drug offenses were adequate in cases involving "dangerous handling" of a substance in a manner that violates other listed statutes relating to hazardous waste. *See* Pub. L. No. 104-237, § 303, 110 Stat. 3099 (1996). Only if sentences did not "adequately punish" these offenses was the Commission to promulgate a new guideline or amendment. Id. Without engaging in any independent analysis or study of the incidence or harm created by such conduct, the

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[11]Transcript of Public Hearing, at 204-06 (Mar. 15, 2006), *available at* http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf (Judge Ruben Castillo).

constitutionality of punishing defendants for uncharged offenses, or whether sentences for such offenses were inadequate, the Commission added a two-level enhancement (along with an invited upward departure in more extreme cases) for environmental violations occurring "in association with" an illicit manufacturing or other drug trafficking offense. U.S.S.G. App. C, Vol. I, Amend. 555 (Nov. 1, 1997) (amending U.S.S.G. § 2D1.1). And despite that it only followed a portion of the directive, the Commission stated that it increased sentences "in response to" the directive. Id.

- **Obstruction of justice:** Congress directed the Commission to review and amend "as appropriate" guideline penalties for obstruction of justice to ensure they are sufficient to deter and punish that activity. Pub. L. No. 107-204, §§ 805(a), 1104(b), 116 Stat. 745 (2002). The Commission responded by increasing the base offense level by two levels and adding a new two-level enhancement. U.S.S.G. App. C, Vol. II, Amend. 647 (Jan. 23, 2003) (amending U.S.S.G. § 2J1.2). As its reason, the Commission merely stated that it was "implementing" the directive. *Id.* The Commission did not independently review or study the guideline to determine its sufficiency without those increases.

RITA MEMO

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Sentencing Workshop for Federal Defenders
Los Angeles, California

WHAT IS LOVELY (AND NOT SO LOVELY) ABOUT *RITA* IMPLICATIONS FOR *GALL*, *KIMBROUGH* AND FUTURE CASES

September 12, 2007
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I. The Opinions, *Rita v. United States*, 127 S. Ct. 2456 (2007)

The majority opinion was written by Justice Breyer, joined in full by Justices Roberts, Kennedy and Alito. It is not without its mixed messages, bizarrely circular language, and misleading passages. Still, it is less than a ringing endorsement of the Guidelines. Aside from the vaguely suggestive *dicta* (which must be read closely for what it says and does not say), we find an appellate presumption of reasonableness for within guideline sentences with no independent legal effect and a notably tentative justification. In contrast, district court judges are mandated to determine the appropriate sentence under § 3553(a) completely independently of the Guidelines, and to consider nonfrivolous arguments to disregard the guidelines on general policy grounds, case-specific grounds, guideline-sanctioned departure grounds, or "regardless."

Justices Stevens and Ginsburg joined the opinion and judgment but wrote a concurrence, elaborating on abuse of discretion review and confronting the most obvious deficiency in the guidelines (their failure to account for individual characteristics) which the majority opinion notably managed to dodge. Since only Justices Roberts, Kennedy and Alito joined Justice Breyer's opinion without separately concurring, the concurrence by Justices Stevens and Ginsburg narrows the scope of the holding and its rationale.

Justices Scalia and Thomas concurred in the judgment and only in Part III of the opinion (which describes what kind of statement of reasons is required and holds that the one in *Rita* was enough). They did not join the rest of the opinion for reasons that could have been a dissent. But only Justice Souter truly dissented, in a refreshingly straightforward and realistic way.

A. The Appellate Presumption (Part II), Breyer, Kennedy, Roberts, Alito, Stevens, Ginsburg, JJ.

A presumption of reasonableness *only* on appeal (*not* in the district court) for a within-guideline sentence comports with the Sixth Amendment and the excision of 3553(b) and 3742(e) in *Booker*, where (1) the presumption is not mandatory, binding, or more deferential to the Commission than to the district court, and (2) the district court independently reaches the conclusion that the guideline sentence is the appropriate sentence under § 3553(a) after considering nonfrivolous arguments (if made) that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, warrants a guideline-sanctioned departure, or that a different sentence is appropriate regardless, and (3) at least if the case is not one of Justice Scalia's supposedly "hypothetical" ones in which the sentence is upheld as not unreasonably excessive only because of a judge-found fact.

In regard to the latter limitation, note that in this case, the sentencing judge *did* resolve a disputed fact (the cross-reference in the perjury guideline) to increase the guideline sentence from a range of 15-21 months corresponding to the jury verdict to a range of 33-41 months, imposing 33 months. However, all members of the Court seem to have either missed that point or thought that an increase of that magnitude could still be reasonable based on the jury's findings alone. In any event, *Rita* can be described as a case in which the guidelines were applied based on jury-found facts alone with no judicial factfinding to enhance the within-guideline sentence.

1) **The presumption is *not mandatory*.** Courts of appeals "may" adopt it, but need not. *Rita*, 127 S. Ct. at 2462.

   a. In circuits that *have* adopted a presumption, we can argue that the presumption should be discarded, and in circuits that have *not* adopted the presumption, that it should not be adopted. The reasons for the presumption are notably weak even as stated, *see* I(A)(7)(a) and (8), *infra*, and we can continue to argue that the Guidelines do not merit a presumption.

   b. Courts of appeals may, and should, decline to apply a presumption where the guideline at issue plainly does not advance the purposes of sentencing (*e.g.*, the crack guideline, the career offender guideline, acquitted and uncharged conduct, immigration guidelines).

2) **The presumption is "*not binding*."** *Id.* at 2463 (emphasis added). "It does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case." *Id.* In other words, this is not like any presumption we know of. Indeed, it has no "independent legal effect." *Id.* at 2465. It "simply recognizes the real-world circumstance that when the judge's *discretionary* decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is *probable* that the sentence is reasonable." *Id.* (emphasis added).

3) **There is *no presumption in the district court*.** *Id.* at 2465 ("We repeat that the presumption before us is an *appellate* presumption. Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. . . . the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.").

   a. Ensure that district courts understand that they are expressly barred from entertaining even the weak, nonbinding "presumption" that the Court says courts of appeals "may" employ.

   b. The district court need not say it is applying a presumption in order to be reversed. It may say, for example, that it does not see "any reason why the

guideline sentence isn't appropriate in this case," or that it cannot sentence below the guidelines range unless the defendant "presented some kind of good reason" to do so. *See United States v. Ross*, __ F.3d __, 2007 WL 2593509 (7th Cir. Sept. 11, 2007) (reversing based on those statements).

4) **"Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge."** *Id.* at 2463. Put another way, courts of appeals may no longer give greater deference to the Sentencing Commission's supposed factfindings (*e.g.*, family circumstances are "not ordinarily relevant") than to the district court judge's real factfindings (*e.g.*, in my experience, family circumstances are often very relevant, and in this case, they warrant a sentence of probation).

   a. This is useful to support an argument in the district court for a below-guideline sentence, and to defend the sentence in the court of appeals on a government appeal of a below-guideline sentence. Whatever "factfinding" the Sentencing Commission did in promulgating a guideline (usually none, always check the Reasons for Amendment in the amendments in Appendix C cited in the Historical Note and the end of the guideline) cannot be given deference on appeal over the district court's conclusions to the contrary.

      (i) For example, the Sentencing Commission says the appropriate sentence for a defendant with two prior minor drug offenses is 210-262 months under the career offender guideline, and a departure of one level is all that is allowed. The district court disagrees, based on its own factfinding about the career offender guideline based on the many cases the judge sees (and which may also be informed by the Commission's own findings that the career offender guideline fails to advance the purposes of sentencing and creates unwarranted disparity, *see* Fifteen Year Report at 133-34) and the facts and circumstances of the particular offense and offender, and determines that 40 months is the appropriate sentence. Under *Rita*, the district court's conclusions should not be reversible.

5) **District courts are free to disagree with the Guidelines on general policy grounds, individualized fact-based grounds, or both.** District courts are no longer required, or permitted, to simply defer to the Sentencing Commission's policies. *Rita*, 127 S. Ct. at 2465, 2468 (district court may conclude that the guideline sentence fails to reflect § 3553(a) considerations, reflects an unsound judgment, does not treat defendant characteristics in the proper way, or that a different sentence is appropriate "regardless."); *id.* at 2463 (The presumption is not binding, does not place any burden of persuasion or proof on either party, and does not reflect greater deference to the Commission's factfinding than to that of the district court, but merely "reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case," which is a "double determination").

a. *Rita* invites arguments that attack the Guidelines head-on. The district court "may hear arguments by prosecution or defense that the Guidelines sentence should not apply" because "the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply," "the Guidelines sentence *itself* fails properly to reflect § 3553(a) considerations," or "the case warrants a different sentence regardless." *Id.* at 2465. A party may "contest[] the Guidelines sentence *generally* under § 3553(a)" by "argu[ing] that the Guidelines reflect an *unsound judgment*, or, for example, that they do not generally treat certain defendant characteristics in the proper way," or may "argue[] for departure." *Id.* at 2468. Launch such attacks wherever appropriate, reminding district judges that they are empowered and required by *Rita* to hear and consider them when raised.

b. We must educate judges about the fact that what they imagine the Commission does in the way of "factfinding" rarely occurs, or, if it does not support a guideline increase or shows that an existing guideline fails to achieve or undermines sentencing purposes, it is ignored. It is not hard to do this. At the end of each guideline is a "Historical Note" stating the guideline's effective date, and the amendment number for each time it was amended. Each amendment and the "Reasons for Amendment" appear in Appendix C to the Manual, which is published every year in hard copy and is also available on Westlaw. The "Reasons for Amendment" rarely reflect any data analysis or actual reasons. For example, when 5H1.12, prohibiting consideration of lack of guidance as a youth and similar circumstances indicating a disadvantaged background, was added in 1992, the following "Reason for Amendment" was given: "This amendment provides that the factors specified are not appropriate grounds for departure." USSG, App. C, amend. 466. You can dig deeper to find affirmatively damning evidence by going to law review articles, transcripts of Commission hearings, Defender letters to the Commission, etc., *see* The Continuing Struggle for Just, Effective and Constitutional Sentencing After *United States v. Booker* at 56 (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf, but for the most part, all you need to do is point to the lack of expert reasoning or empirical evidence on the face of the Reasons for Amendment.

c. For some examples of district court opinions analyzing and rejecting Guidelines policies, and Sentencing Commission Reports, other government reports, and studies from other sources upon which courts can rely to do so, *see Gall v. United States*, No. 06-7949, Brief of the Fed. Public & Cmty. Defenders & Nat'l Ass'n of Fed. Defenders at 15-29, http://www.fd.org/pdf_lib/Gall_Defender_NAFD_Amicus_Final.pdf; Federal Public Defender's Office Sentencing Resource Manual, http://www.fd.org/pdf_lib/SentencingResourceManualMay2007.pdf; The Continuing Struggle for Just, Effective and Constitutional Sentencing After *United States v. Booker* (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf.

d. As to the argument that the Guidelines "do not generally treat certain defendant characteristics in the proper way," Justices Stevens and Ginsburg explicitly note that the Commission has no standards or recommendations for individual characteristics, *i.e.*, they are "not ordinarily considered under the Guidelines," noting Justice Breyer's admission in his 1988 Hofstra article that the only offender characteristic is criminal history. But 3553(a) "requires" sentencing judges to consider these matters, and so appellate courts must consider them as well but under the abuse of discretion standard, which means they *must* defer to the district court and *may not* substitute their own judgment. *Id.* at 2473 & n.3.

e. In *United States v. Paul*, 2007 WL 2384234, No. 06-30506 (9th Cir. Aug. 17, 2007), an unpublished decision citable under 9th Cir. R. 36-3, the 9th Circuit vacated a within-Guidelines sentence as "unreasonable" because it "d[id] not fall within the 'heartland' of cases to which the guidelines are most applicable, as described by the Supreme Court in *Rita*," and the district court failed to consider the strong mitigating evidence introduced by the defendant. *Id.* at *2

f. In *United States v. Wachowiak*, __ F.3d __, 2007 WL 2189561 (7th Cir. Aug. 1, 2007), the 7th Circuit affirmed a 70-month sentence for downloading and sharing child pornography where the Guideline range was 121 to 151 months, confirming the district court's freedom under *Rita* to find the Guidelines inadequate. Although it strongly hinted that it believed the sentence was too low, the 7th Circuit approved of the district judge's careful review of the § 3553(a) factors, and (most of) his reasons for concluding that the Guidelines failed to adequately account for particular factors calling for a lower sentence. The district judge had concluded that the defendant's strong expression of remorse and his "insight into his condition and the harm he was causing children" were mitigating factors not adequately reflected in the Guidelines' acceptance-of-responsibility factor, and that the defendant's nature and strength of character, as testified to by his family, friends, colleagues, and teachers, were mitigating factors not adequately reflected in the Guidelines' criminal history score. The court did not approve of the district court's focus on the stigma of a child pornography conviction, noting that this factor did not genuinely distinguish the defendant from the mine-run of child pornography offenders.

g. Under *Cunningham v. California*, 127 S. Ct. 856 (2007), judges' freedom to disagree with the Sentencing Commission as a matter of policy is *essential* to avoiding a Sixth Amendment violation. There, the Court held that a sentencing system that did not permit a judge to sentence outside the presumptive middle range based on "general objectives of sentencing" alone without a "factfinding anchor" violates the Sixth Amendment. *Id.* at 862-70. The government has conceded that the judge must be free to disagree with the Guidelines based on policy alone without a factfinding. *See* Transcript of Oral Argument at 50, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007), http://www.fd.org/pdf_lib/Rita%20oral%20argue.pdf; Transcript of Oral

Argument at 32-33, *Claiborne v. United States*, No. 06-5618 (U.S. argued Feb. 20, 2007), http://www.fd.org/Claiborne%20oral%20argue.pdf.

It is at least arguable, and probably correct, that when a sentencing judge finds facts that were not found by a jury or admitted by the defendant to calculate the guideline range, then sentences below the guideline range based on a policy disagreement with the guidelines, and the court of appeals reverses on the basis that the district court may not disagree with the guidelines as a matter of policy but instead must impose the guideline sentence unless the judge finds individual case-specific factors warranting a lower sentence, the court of appeals is replicating the system held unconstitutional in *Booker*, i.e., holding that a sentence longer than that authorized by the jury verdict or admitted by the defendant is binding on the sentencing judge absent offense- or offender-specific mitigating factors. *See Booker v. United States*, 543 U.S. 220, 234 (2005) ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself."). *See* Petition for Panel Rehearing and Rehearing En Banc at 8-10, *United States v. Ricks*, No. 05-4833, filed September 7, 2007, available at http://www.fd.org/odstb_SentencingResource3.htm#SENTENCE.

One might say that an appellate prohibition on courts' ability to disagree with the Guidelines in such a way that leads to a *lower* sentence (as in *Kimbrough*, *Ricks* and all of the other crack cases except *Pickett*) does not violate the Sixth Amendment in light of *Harris v. United States*, 536 U.S. 545 (2002). However, such a one-way ratchet was explicitly rejected in *Booker* as a matter of statutory construction, that is, as inconsistent with congressional intent. *See Booker*, 543 U.S. at 266; *see also Rita*, 127 S. Ct. at 2477 n.2 (Scalia & Thomas, JJ., concurring) ("since reasonableness review should not function as a one-way ratchet, we must forswear the notion that sentences can be too low in light of the need to abandon the concept that sentences can be too high") (citations omitted).

6) **The district court must subject the Guidelines' advice (or whatever sentence the government or Probation Officer proposes) and the alleged facts to "thorough adversarial testing."** *Id.* at 2465, citing "Rules 32(f), (h), (i)(C) and (i)(D); *see also Burns v. United States*, 501 U.S. 129 (1991) (recognizing importance of *notice and meaningful opportunity to be heard at sentencing*)." (emphasis added) Put another way, the sentence cannot be reasonable unless it was subjected to thorough adversarial testing.

   a. This provides a basis for arguing that the courts of appeals that have held that no notice of an upward variance is required are wrong.

   b. This also provides a basis for arguing that the Probation Officer's secret recommendation cannot be secret.

c. Further, this directive should be interpreted to mandate thorough testing of *both* (a) the merits of whether the guideline sentence properly reflects § 3553(a) in general and on the facts of the case, *and* (b) whether the facts that the government and/or Presentence Report allege in support of a guideline (or higher) sentence are sufficiently reliable.

d. The narrow holding of *Burns* was that Rule 32 requires advance notice of a district court's intention to impose an upward departure as a matter of constitutional avoidance. *Burns*, however, tells us what the components of "thorough adversarial testing" as required by the Due Process Clause are: notice, a meaningful opportunity to be heard, the right to confront adverse witnesses and evidence, and the right to a full, formal, adversarial-style hearing.[1] This passage in *Rita* may be no accident, as some of the *amici* argued that the Guidelines cannot be presumptively reasonable because the Commission's procedural advice to find facts by a preponderance of the probably accurate information, including hearsay, *see* USSG 6A1.3, produces substantial sentencing increases based on utterly unreliable information. The Guidelines' procedural advice falls far short of the "thorough adversarial testing" described in *Burns*, and thus, after *Rita*, cannot produce a "reasonable" sentence. This passage is also a reminder to use *Burns* to breathe new life into arguments that the Due Process Clause requires procedures designed to produce *reliable* factfinding. The Commission's purported pronouncement of minimum constitutional standards, which invite

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[1] According to *Burns*, 501 U.S. at 137-38:

> [T]his Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals both notice and a meaningful opportunity to be heard. *See American Power & Light Co. v. SEC*, 329 U.S. 90, 107-108, 67 S.Ct. 133, 143-144, 91 L.Ed. 103 (1946) (statute permitting Securities and Exchange Commission to order corporate dissolution); *The Japanese Immigrant Case*, 189 U.S. 86, 99-101, 23 S.Ct. 611, 614-615, 47 L.Ed. 721 (1903) (statute permitting exclusion of aliens seeking to enter United States). The Court has likewise inferred other statutory protections essential to assuring procedural fairness. *See Kent v. United States*, 383 U.S. 541, 557, 86 S.Ct. 1045, 1055, 16 L.Ed.2d 84 (1966) (right to full, adversary-style representation in juvenile transfer proceedings); Greene v. McElroy, 360 U.S. 474, 495-508, 79 S.Ct. 1400, 1413-1420, 3 L.Ed.2d 1377 (1959) (right to confront adverse witnesses and evidence in security-clearance revocation proceedings); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51, 70 S.Ct. 445, 453-455, 94 L.Ed. 616 (1950) (right to formal hearing in deportation proceedings).
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> In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause. . . . [W]e decline to impute such an intention to Congress. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

unreliable factfinding, is illegitimate for another reason – only courts are empowered by our Constitution to define constitutional limits, and the Commission is *not* a court. *See Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989).

7) **When the district court imposes a guideline sentence, it must first *independently* (*i.e.*, independently of the Sentencing Commission) evaluate whether that sentence complies with 3553(a).** Theoretically, the district court can be reversed if it fails to act independently and simply follows the guidelines.

a. This requirement is inherent in the primary justification for/description of the appellate presumption of reasonableness. The presumption is not binding, does not place any burden of persuasion or proof on either party, and does not reflect greater deference to the Commission's factfinding than to that of the district court, but merely "reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case." *Rita*, 127 S. Ct. at 2463 (emphasis in original); *see also id.* at 2465 ("simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable"); *id.* at 2467-68 ("where judge and Commission both determine that the Guidelines sentences is an appropriate sentence for the case at hand, that sentence likely reflects the § 3553(a) factors (including its 'not greater than necessary' requirement). This circumstance alleviates any serious general conflict between § 3553(a) and the Guidelines, for the purposes of appellate review.").

This description would be entirely circular unless the district court actually conducted an independent assessment of what sentence is sufficient but not greater than necessary to satisfy the purposes of sentencing set forth in 3553(a)(2), after considering all of the purposes and factors set forth in 3553(a)(1)-(7).

b. Argue in the district court that it is the judge's obligation to act completely independently of the Guidelines. Object to any suggestion that the judge is applying a presumption. Giving the Guidelines "heavy weight" or "substantial weight" is no longer permissible. There are more subtle ways of giving undue weight to the Guidelines, such as the judge saying, "Tell me why I should not follow the guidelines in this case," or, "You have not given me sufficient reason not to follow the guidelines in this case." *See United States v. Ross*, __ F.3d __, 2007 WL 2593509 (7th Cir. Sept. 11, 2007). If you prefer a Guideline sentence, you should argue that application of section 3553(a) happens to lead to the same sentence as the Guideline sentence.

c. In the court of appeals, argue that the sentencing judge did not act independently of the Guidelines, and thus the sentence should be reversed and the case remanded for a truly independent analysis.

d. In order to act independently of the Guidelines, sentencing courts must abandon the notion that sentencing within the Guidelines constitutes a legitimate means of adhering to § 3553(a)(6)'s mandate to avoid "unwarranted sentence disparities." To the contrary, reading § 3553(a)(6) in combination with § 3553(a)(4), and observing the maxim that a statute must be construed so that no portion of it is rendered a nullity, § 3553(a)(6) must be read as directing sentencing courts to impose sentences that do not deviate without reasons grounded in the purposes of sentencing from sentences for other defendants *with similar criminal histories and similar offenses of conviction – not* defendants who are "similar" with respect to the bevy of additional factors, including unconvicted separate crimes, included by the Guidelines and § 3553(a)(4). This is the express mandate of § 3553(a)(6), which refers simply to disparities between defendants "with *similar records* who have been *found guilty of similar conduct*." 18 U.S.C. 3553(a)(6) (emphasis supplied). Thus, the Guidelines *create* unwarranted disparity by resulting in widely varying sentences for defendants with similar records who have been found guilty of similar conduct. For further arguments that the Guidelines fail to prevent, hide, and create unwarranted disparity, *see* The Continuing Struggle for Just, Effective and Constitutional Sentencing After *United States v. Booker* (August 2006), http://www.fd.org/pdf_lib/EvansStruggle.pdf.

8) **It is "fair to *assume* that the Guidelines, *insofar as practicable*, reflect a *rough approximation* of sentences that *might* achieve § 3553(a)'s objectives."** *Rita*, 127 S. Ct. at 2464-65 (emphasis supplied).

a. Use this as a sword when the judge increases the sentence based on resolution of a disputed case-specific fact. *See* Brief of Appellant, *United States Preciado*, No. 06-50649 (9th Cir.), filed July 12, 2007; Objections to District Court's Proposed Upward Departure and Sentencing Memorandum, *United States v. Garcia-Renteria*, No. 06 CR0304 (S.D. Cal.), filed July 17, 2007, both available at http://www.fd.org/odstb_SentencingResource3.htm#SENTENCE.

b. Debunk it when the government, district court or court of appeals contends or is inclined to believe that it means guideline sentences are automatically reasonable. This formulation is a mere shadow of the aggressive ad campaign launched by the Commission and DOJ after *Booker* insisting that the Guidelines *do* embody all relevant sentencing considerations for every offense and offender. However, the lead-up to it will undoubtedly be misread as an endorsement of Commission expertise and consequent automatic reasonableness of guideline sentences, if we allow it. Justice Breyer not quite accurately describes the statutory instructions to the Commission and those to district courts as congruent, "the one, at retail, the other at wholesale." *Id.* at 2463. And while he never goes so far as to say that the Commission has actually carried out its instructions (speaking in terms of its

"efforts" to do so, that it "tried" and "intends" and "seeks," that its work is "ongoing" and it "can" revise the Guidelines in response to concerns, *id.* at 2463-64), he leaves the vague impression that it has. His history of guideline development ends in the 1980s with the supposed "empirical examination" of 10,000 PSRs, *id.* at 2464, failing to mention that the original Commission adopted sentences that were significantly more severe than past practice or the relentless increases ever since then.

Unless we set the record straight, the government and many lower courts will read this to say that Congress instructed the Commission to consider the very same things in writing the guidelines that sentencing courts are to consider in imposing sentence; the Commission has faithfully applied those instructions; ergo, a guideline sentence is always reasonable.

Here are a few things to point out if necessary:

First, only three other justices (Roberts, Alito, Kennedy) fully subscribe to Justice Breyer's slippery version of the statutes and the vague implication that the Commission has implemented its instructions. Justices Scalia and Thomas did not join in this part of the opinion. Justice Souter dissented in full and wryly indicated that the Commission's views may not be as "weighty as the Court says they are." *Id.* at 2488. Justices Stevens and Ginsburg outed the Commission for "not develop[ing] any standards or recommendations" for individual characteristics, noting that then Commissioner Breyer admitted as much in his 1988 Hofstra article. *Id.* at 2473.

Second, all eight justices who affirmed Rita's sentence agree that the guideline sentence may not properly reflect the § 3553(a) purposes and factors, that the Guidelines may reflect unsound judgment, that the Guidelines may not treat individual characteristics properly, and that the case may warrant a different sentence "regardless." *Id.* at 2465, 2468. And they all recognize that the district court must apply the parsimony clause. *Id.* at 2463, 2467; *id.* at 2482 (Scalia & Thomas, JJ., concurring).

Third, though Breyer writes that congressional statutes "tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives," *id.* at 2463, this is inaccurate. Congress directed the Commission to write guidelines for "categories of offenses" and "categories of defendants," 28 U.S.C. § 994(c), (d), and in doing so to "assure the meeting of the purposes of sentencing as set forth in §3553(a)(2)." 28 U.S.C. § 991(b)(1)(A). It did not instruct the Commission to write guidelines that are "sufficient but not greater than necessary" to satisfy those purposes, as district courts *must* do. Nor did it directly instruct the Commission to write guidelines that take account of the "nature and circumstances of the offense and the history and characteristics of the offender," which district courts *must* consider under § 3553(a)(1) in identifying the sentence that is "sufficient but not greater than necessary" to satisfy the purposes set forth in § 3553(a)(2).

Fourth, the Guidelines are inescapably "general" and "rough" even by Breyer's account. And there are many examples of the guidelines not being amended to accord with the Commission's own research, notably the criminal history rules, career offender guideline, relevant conduct guidelines, the drug guidelines generally, and the substantial assistance guideline (which requires a government motion where the statute does not).

Fifth, you can point out certain historical facts that Justice Breyer omitted. He cites 28 USC § 994(m), *id.* at 2463, which told the original Commission to study actual sentences served (in a parole system). Instead, the Commission examined 10,000 PSRs showing sentences *imposed. Id.* While Justice Breyer claims that the *original* Commission then modified and adjusted past practice in the interests of "greater rationality, avoiding inconsistency, complying with congressional instructions, and the like," *id.* at 2464, he omits that the original Commission implemented sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," including fraud, drug trafficking (*above* what the mandatory minimum laws required, as the Commission recently acknowledged in its Statement of Reasons for the crack amendment, *see* Amendments to the Sentencing Guidelines, May 11, 2007, at p. 66, http://www.ussc.gov/2007guid/may2007rf.pdf), immigration offenses, robbery of an individual, murder, aggravated assault, and rape.[2] According to Justice Breyer's own contemporaneous explanation, these deviations from past practice resulted from "'trade-offs' among Commissioners with different viewpoints."[3] The original Commission estimated that its own policy decisions, as distinct from congressional mandates, would increase the prison population by 10% over ten years.[4] As the Commission reported in 2004, the Guidelines alone (independent of mandatory minimum laws) were responsible for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession, and that many offenses not subject to mandatory minimum statutes had shown severity increases similar to offenses subject to mandatory minimums. U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 53-54, 64, 67, 138-139 (2004). The Commission acknowledged that guideline sentences were often increased due to

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[2] U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 47 (2004), available at http://www.ussc.gov/15_year/15year.htm.

[3] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19 (1988).

[4] U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(g) (1988).

real or perceived political pressure, and suggested that penalties might be reduced to better achieve sentencing purposes and to relieve prison overcrowding. *Id.* at 77, 137-140; Executive Summary vi, vii.

Sixth, Justice Breyer's description of the intended "evolution" of the Guidelines can be helpful. He says the Commission's work is "ongoing," that it "will" collect statements of reasons when district courts depart or impose non-guideline sentences, and that it "may" obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. *Id.* at 2464. And the Commission "*can* revise the Guidelines accordingly," but he does not seriously contend that it has done so.[5] *Id.*

B. The Statement of Reasons (Part III), Breyer, Kennedy, Roberts, Alito, Stevens, Ginsburg, Scalia, Thomas

The district court in *Rita* complied (barely) with the statement-of-reasons mandate of 18 U.S.C. § 3553(c).

The rubber meets the road in a not very attractive way in the discussion in Part III of what statement of reasons suffices for a guideline sentence versus a non-guideline sentence (which Justices Scalia and Thomas join), and in the application of the presumption to Rita in Part IV (which Justices Scalia and Thomas do not join and Justice Stevens does not entirely agree with but joins anyway "given the importance of paying

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[5] Justice Breyer cites "USSG § 1B1.10(c) (listing 24 amendments promulgated in response to evolving sentencing concerns)." *Id.* USSG 1B1.10(c) is what the government cited in its *Rita* Brief in an attempt to refute the contention that the guidelines have been amended in a one-way upward ratchet. This is 3% of all amendments over the past twenty years. Some of these 24 amendments did not lower sentences, App. C, amend. 156, 461; others raised sentences, *id.*, amend. 269, 329; others simultaneously raised and lowered sentences, *id.*, amend, 130, 176, 341, 657; others lowered sentences which were raised later, *id.*, amend. 380, 433; others adjusted for typographical errors and other mistakes, *id.*, amend. 499, 506, 606; and almost none apply to any substantial number of cases. In its *Rita* brief, the government pointed to three reductions that it said have "broad application." In one, the Commission lowered the maximum sentence in drug cases from a level 42 (360 months to life) to a level 38 (235 months to life) to accommodate upward role and weapon adjustments (resulting in those cases in 292 months to life). At the same time, the Commission invited upward departure above level 38. *See* App. C, amend. 505 (Nov. 1, 1994). There appear to be no statistics on the number of cases affected by lowering the drug guideline maximum, but less than 2% of all offenders are sentenced at level 38 or above each year. *See* 2001-2005 Sourcebooks of Federal Sentencing Statistics, Table 21. The second example was the two-level reduction for safety valve, *see* App. C, amend. 515 (Nov. 1, 1995), which was directed by Congress, but does not successfully apply to all low-level offenders as intended. *See* Jane L. Froyd, Comment, *Safety Valve Failure: Low Level Drug Offenders and the Federal Sentencing Guidelines*, 94 Nw. U. L. Rev. 1471, 1498-1500 (2000). The third example was the reduction in base offense level for drug defendants who receive a mitigating role adjustment. *See* App. C, amend. 640 (Nov. 1, 2002). The extent of this reduction was limited two years later. *See* App. C, amend. 668 (Nov. 1, 2004).

appropriate respect to the exercise of a sentencing judge's discretion," perhaps setting the stage for *Gall*).

1) **Despite the Court's statement that the presumption imposes no particular burden on any party, *defense counsel must contest the guideline sentence in order to obtain a different sentence or to claim on appeal that there was no independent evaluation.***

   a. **The only way to enforce an independent evaluation and a full explanation of reasons is to contest the guideline sentence.** "Unless a party contests the Guidelines sentence generally under § 3553(a)-that is argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way-or argues for departure, the judge normally need say no more" than that the case is "typical." *Id.* at *2468. When a party presents "nonfrivolous reasons for imposing a different sentence" then the judge "will normally go further." *Id.* "Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." *Id.*

   b. **In contrast, a guideline sentence requires [gobbledygook in the way of reasons], but you can force the issue by presenting strongly supported, nonfrivolous arguments. Only then can you argue that the "sentencing judge [did not] set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."** *Id.* at 2468. "[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3353(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical." *Id.* at 2468. Looking into our crystal ball, this is what occurred in Rita's case: The judge "said that this range was not 'inappropriate.' (This, of course, is not the legal standard for imposition of sentence, but taken in context it is plain that the judge so understood.) He immediately added that he found that the 33-month sentence at the bottom of the Guidelines range was 'appropriate.' He must have believed that there was not much more to say." *Id.* at 2469. Unfortunately, this rubber stamp can (and therefore will) signal courts of appeals that even if the district court used the wrong legal standard, and said little or nothing about the reasons proffered, at least in a "conceptually simple" case like this, they can just assume the right reasons were intended. *Id.* at 2469.

   c. Argue that the record does not show, as it supposedly did in *Rita*, that the judge actually "listened to" each argument and "considered" the evidence presented. *Id.* at 2469. The Sixth Circuit recently vacated a sentence where the sentencing judge had made only a cursory reference to the § 3553(a) factors in imposing a Guidelines sentence. The court distinguished *Rita* on the ground that "the record in *Rita* made clear that the district court considered and rejected the defendant's

arguments for a lower sentence, as the district court summarized the defendant's three arguments before rejecting them and sentencing the defendant within the Guidelines range." *United States v. Thomas*, __F.3d__, 2007 WL 2287740, at *4 (6th Cir. 2007) (*citing Rita*, 127 S. Ct. at 2461).

d. There is a legitimate purpose for a more specific statement of reasons for a non-guideline sentence, although it has yet to be realized since the Guidelines' inception. The "Commission's work is ongoing," and the SRA and the Guidelines "foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Id.* at 2464. "By articulating reasons, even if brief, the sentencing judge . . . helps that process evolve. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court. That being so, his reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors, can provide relevant information to both the court of appeals and ultimately the Sentencing Commission. The reasoned responses of these latter institutions to the sentencing judge's explanation should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw." *Id.* at 2469. "By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, see § 3553(c)(2) (2000 ed., Supp. IV), appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts. See Booker, supra, at 264, 125 S.Ct. 738 (citing 28 U.S.C. § 994 (2000 ed. and Supp. IV))." *Id.* at 2483 (Scalia & Thomas, JJ., concurring).

NOTE: Justice Breyer does not claim that this has ever *actually* happened, but it might if district courts truly have broad discretion to reject the guidelines and state why. *See Gall v. United States*, No. 06-7949, Brief of the Fed. Public & Cmty. Defenders & Nat'l Ass'n of Fed. Defenders, http://www.fd.org/pdf_lib/Gall_Defender_NAFD_Amicus_Final.pdf.

C. Substantive Reasonableness (Part IV), Breyer, Kennedy, Roberts, Alito, Stevens, Ginsburg

The Fourth Circuit did not err in upholding Rita's sentence as "reasonable."

1) A majority of the Court (Breyer, Roberts, Kennedy, Alito, Stevens and Ginsburg, JJ.) apply not just procedural reasonableness review (as Justices Scalia and Thomas would have it), but substantive reasonableness review, despite the fact that at least Justices Scalia, Thomas, Stevens and Ginsburg acknowledge that this will lead to a Sixth Amendment violation in some cases.

2) One factor noted in affirming the Fourth Circuit was that the sentencing judge sought "assurance" that the Bureau of Prisons would provide appropriate treatment for Rita's physical problems. *Id.* at 2470. If BOP does not provide adequate treatment for your

client's health or mental health problems, as it often does not,[6] put on evidence to that effect. *See United States v. Martin*, 363 F.3d 25, 49-50 & n.39 (1st Cir. 2004); *United States v. Derbes*, 369 F.3d 579, 581-83 (1st Cir. 2004); *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000).

3) Another was that Rita had no more reason to fear retaliation than other former law enforcement might suffer. But, as in *Koon*, if the district court imposed a lower sentence on this basis, it should not be reversed.

4) Rita's military service in particular: "Like the District Court and the Court of Appeals, we simply cannot say that Rita's special circumstances are special enough that, in light of § 3553(a), they require a sentence lower than the sentence the Guidelines provide." *Id.* at 2470. But if the district court gave a lower sentence on this basis, it should not be reversed, and if it was reversed on the basis that the Guidelines deem military service not ordinarily relevant, it would violate the Sixth Amendment if it was reversed, as Deputy SG Dreeben conceded. *See* Transcript of Oral Argument at 32-35, *Rita v. United States*, No. 06-5754 (U.S. argued Feb. 20, 2007), http://www.fd.org/pdf_lib/Rita%20oral%20argue.pdf.

5) Justice Breyer dodged the Guidelines' most obvious conflict with section 3553(a), their blanket rejection of individual circumstances. Like a court of appeals judge, he declined to consider the argument that the sentence was unreasonable under the statute because the Guidelines expressly reject physical condition, employment record and military service, because "Rita did not make that argument below." *Id.* at 2470.

D. Concurring Opinion of Justices Stevens & Ginsburg

The concurring opinion of Justices Stevens and Ginsburg is necessary to a proper interpretation of Parts II (defining the presumption) and IV (applying substantive review) of Justice Breyer's opinion. Because Justices Scalia and Thomas concurred only in Part III (statement of reasons review), only three other justices (Roberts, Kennedy, Alito) joined Justice Breyer in Parts II and IV without concurring separately. "[W]hen no single rationale explaining the result carries the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193 (1977).

1) The Breyer opinion states that "appellate 'reasonableness' review merely asks whether the trial court abused its discretion." *Rita*, 127 S. Ct. at 2465. The Stevens concurrence elaborates on what this means.

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[6] *See, e.g.*, Daniel Zwerdling, The Death of Richard Rust, National Public Radio, All Things Considered, December 5, 2005, available at http://www.npr.org/templates/story/story.php?storyId=5022866; Betty Brink, Hospital of Horrors, Fort Worth Weekly, October 19, 2005, available at http://www.fwweekly.com/content.asp?article=3325; Betty Brink, Cancer Cell, Fort Worth Weekly, August 24, 2005, available at http://www.fwweekly.com/content.asp?article=2691.

Booker replaced *de novo* review with an abuse of discretion standard called reasonableness review. *Booker* restored the abuse of discretion standard identified in *Koon*, except that the focus is *not* departure *from* the guidelines under section 3553(b),[7] but the exercise of discretion "with regard to § 3553(a)." *Rita*, 127 S. Ct. at 2470-72 (Stevens, concurring).

The abuse of discretion standard must be highly deferential to the sentencing court, and "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence," because district courts are "better positioned" to decide the issues, have "insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon," have "special knowledge" about local practices, and have an "institutional advantage," superior "vantage point," and "day-to-day experience." Even if full knowledge of the factual setting were possible for the court of appeals, it "will often come at unusual expense," and it is impractical to formulate appellate rules of decision for issues that involve multifarious, fleeting, special or narrow facts "that utterly resist generalization." *Id.* at 2471-73.

2) Accordingly, Justice Stevens concludes that "[w]hile reviewing courts may presume a sentence within the advisory Guidelines is reasonable, appellate courts must *still always defer to the sentencing judge's individualized sentencing determination.*" *Id.* at 2472 (emphasis supplied). Further, this standard "allows-indeed, requires – district court judges to consider *all* of the factors listed in § 3553(a) and to apply them to the individual defendants before them. Appellate courts must then give deference to the sentencing decisions made by those judges, whether the resulting sentence is inside or outside the advisory Guidelines range." *Id.* at 2474.

3) The appellate presumption for within-guideline sentences "must be genuinely rebuttable." "Our decision today makes clear" that "the rebuttability of the presumption is real," and "[i]t should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range (and thus potentially subject to a formal 'presumption' of reasonableness) or outside that range. Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post- Booker interregnum will now recognize that the Guidelines are truly advisory." *Id.* at 2474. Hope springs eternal!

4) Justice Stevens highlights the fact that "[t]he Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not

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[7] Under *Koon*, a district court could depart without abusing its discretion only if the Commission did not adequately consider the relevant fact in formulating the guidelines, which was to be determined by considering only the guidelines, policy statements and official commentary, pursuant to the now excised § 3553(b).

ordinarily considered under the Guidelines," *id.* at 2473, not to mention outright prohibited. "As such, they are factors that an appellate court must consider under *Booker*'s abuse-of-discretion standard." *Id.* at 2473. Justice Stevens notes that Justice Breyer acknowledged in his 1988 Hofstra article that the only offender characteristic included in the guidelines in criminal history. *Id.* at 2473 n.3.

5) Justices Stevens and Ginsburg disagree with Justices Scalia and Thomas that there can only be a procedural component to reasonableness review lest the Sixth Amendment be violated in some cases, and agree with Justices Breyer, Roberts, Kennedy and Alito that there can and should be a substantive component to reasonableness review. According to Justices Stevens and Ginsburg, this substantive component apparently should operate only on the extreme margins. "After all, a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable." *Id.* at 2473.

6) Justices Stevens and Ginsburg agree with Justices Scalia and Thomas that substantive reasonableness review makes a Sixth Amendment violation possible, and that an as-applied challenge can be raised in such a case: "[E]ven if some future unusually harsh sentence might violate the Sixth Amendment because it exceeds some yet-to-be-defined judicial standard of reasonableness, Justice SCALIA correctly acknowledges this case does not present such a problem. . . . Such a hypothetical case should be decided if and when it arises." *Id.* at 2473. Note that the Breyer opinion does not deny Justice Scalia's contention, but simply ridicules his use of supposed hypotheticals to make the point. *Id.* at 2466.

E. Concurring Opinion of Justices Scalia & Thomas

Justices Scalia and Thomas wrote separately, concurring in part (*i.e.*, only in Part III, statement of reasons review) and concurring in the judgment. It is unclear why this was not a dissent. *See* subpart 5, *infra*.

1) Justices Scalia and Thomas "would hold that **reasonableness review cannot contain a substantive component at all.**" *Rita*, 127 S. Ct. at 2476 (Scalia & Thomas, JJ., concurring). In order to avoid a Sixth Amendment violation in *all* cases, district courts must be completely free to sentence anywhere within the statutory range, *i.e.*, not subject to substantive review. *Id.* at 2476, 2482.

Under the canon of constitutional avoidance, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail-whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 2478, quoting *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005).

E. As-Applied Challenges

We can raise "as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea." *Id.* at 2479. How to do so?

- One way is to find a case (or more than one case?) reversing a sentence for the exact same crime as substantively excessive, then show that this case has an additional fact that wasn't in that case that makes his sentence reasonable by comparison (like the two brothers who did a robbery, one with racial animus, one without). Then the defendant can argue that that fact is legally essential to his punishment and therefore violates the Sixth Amendment because it was found by a judge.

- Or, the defendant can show that his sentence was affirmed only because of a judge-found aggravating fact that distinguishes his case from the "mine-run." *Id.* at 2476. What is the "mine-run"? Perhaps it is a robbery defendant absent any aggravating facts as in Scalia's second hypo, or the mail fraud defendant in Alito's hypo, or a drug defendant with no uncharged or acquitted transactions.

- Justice Scalia's description of as-applied challenges sounds fairly impractical: "[O]rdinarily defendants and judges will be unable to figure out, based on a comparison of the facts in their case with the facts of all of the previously decided appellate cases [all of them??], whether the sentence imposed would have been upheld as reasonable based only on the facts supporting the jury verdict or guilty plea. . . . Judges [can] create complicated charts and databases, based on appellate precedents, to ascertain what facts are legally essential to justify what sentences." *Id.* at 2480.

- But wait, he endorses Judge Young's method in *United States v. Griffin*, 494 F.Supp.2d 1 (D. Mass. 2007): "At least one conscientious District Judge has decided to shoulder the burden of ascertaining what the maximum reasonable sentence is in each case based only on the verdict and appellate precedent, correctly concluding that this is the only way to eliminate Sixth Amendment problems after *Cunningham* if *Booker* mandates substantive reasonableness review." *Id.* at 2480 n.5. Steve Hubacheck and Shereen Charlick have made excellent use of the *Griffin* case based on this footnote. *See* Brief of Appellant, *United States Preciado*, No. 06-50649 (9th Cir.), filed July 12, 2007; Objections to District Court's Proposed Upward Departure and Sentencing Memorandum, *United States v. Garcia-Renteria*, No. 06 CR0304 (S.D. Cal.), filed July 17, 2007, both available at http://www.fd.org/odstb_SentencingResource3.htm#SENTENCE.

- Seek data for the district from the Probation Office showing sentences imposed when there was no appeal, sentences affirmed on appeal, and sentences imposed

after reversal on appeal. This should be available, *see Richardson v. United States*, 477 F. Supp. 2d 392, 402-05 (D. Mass. 2007) (using such data and complaining bitterly that it is kept secret), and should not be kept secret given *Rita*'s mandate for "thorough adversarial testing," including notice and a meaningful opportunity to be heard.

- The Commission publishes data on sentence length based on sentence imposed, though it does not tell sentence length after appeal. *See* http://www.ussc.gov/sc_cases/Quarter_Report_3rd_07.pdf. Similarly, a table of "U.S. District Courts–Criminal Defendants Sentenced After Conviction, by Major Offense (Excluding Transfers), During the 12-Month Period Ending September 30, 2006," from the JNet, is available at http://www.fd.org/odstb_SentencingResource3.htm#SENTENCE. You could use some combination of statistics that do not factor in appeals, and appellate caselaw for the circuit.

- Note that the Eighth Circuit plays right into an as-applied challenge by phrasing its standard of reasonableness review as requiring a sentence within "the limited range of choice dictated by the facts of the case."

- Do not allow the defendant to admit enhancing facts and object to enhancing facts in the PSR, so that there will be judicial factfinding to challenge.

F. Jury-Found Facts Beyond a Reasonable Doubt

It is worth continuing to at least preserve the argument that the *Booker* "remedial" majority got it wrong, and that the facts must be submitted to a jury and found beyond a reasonable doubt. It is not unlikely that even after *Rita*, *Gall* and *Kimbrough*, the appeals courts will continue to enforce *de facto* mandatory guidelines. If so, it would seem that the Court would have to adopt the jury trial/reasonable doubt remedy. Four justices in *Rita* specifically said they were accepting the *Booker* remedy only because it was *stare decisis*. *See Rita*, 127 S. Ct. at 2470 (Stevens & Ginsburg, JJ., concurring); *id.* at 2475 (Scalia & Thomas, JJ., concurring in part and concurring in the judgment), and Justice Souter said Congress should enact binding guidelines with any fact necessary for an upper range guideline sentence to be determined by a jury. *Id.* at 2488 (Souter, J., dissenting).

SOUTHERN DISTRICT PROBATION OFFICE INITIATIVES

PRESENTED BY

Burt Maroney, Kito Bess and Tim Heinrichs
U.S. Probation Officers

Effective Offender Employment Programs

Our Mission:
Safer Communities
Through Positive Change.

In 2003, unemployed offenders under supervision were revoked at a rate 500% higher than those who were employed

80% of the offenders revoked in 2003 were unemployed

Purpose:

Safer Communities Through Positive Change

Promoting Community Safety While Providing Opportunities For Positive Change and Long Term Risk Reduction

Meta-analysis of recent studies estimate:

- 20% of our cases will re-offend during supervision
- 60% of our cases have the POTENTIAL for success if given the right opportunities
- 20% of our cases are going to succeed with minimal intervention of the supervising officer

Building Partnerships

- Iowa Workforce Development
- Job Fairs
- Apprenticeship Training Programs
- Identifying large employers in target area
- Working with correctional agencies on re-entry programs, such as pre-release job fairs.

A Unified Re-Entry Program

- Identifying Labor Market Trends
- Reintegration
- Building inter-organizational partnerships
- Identifying pre-existing Programs
- We're all on the same team

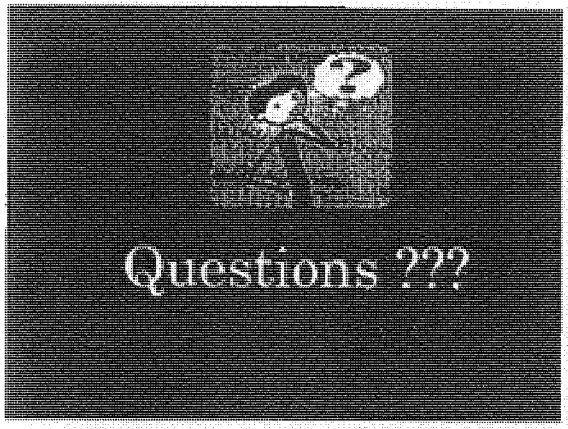
Apprenticeships

Getting people connected with good jobs that pay a living wage within the first 30 days of their release.

Why is this important?

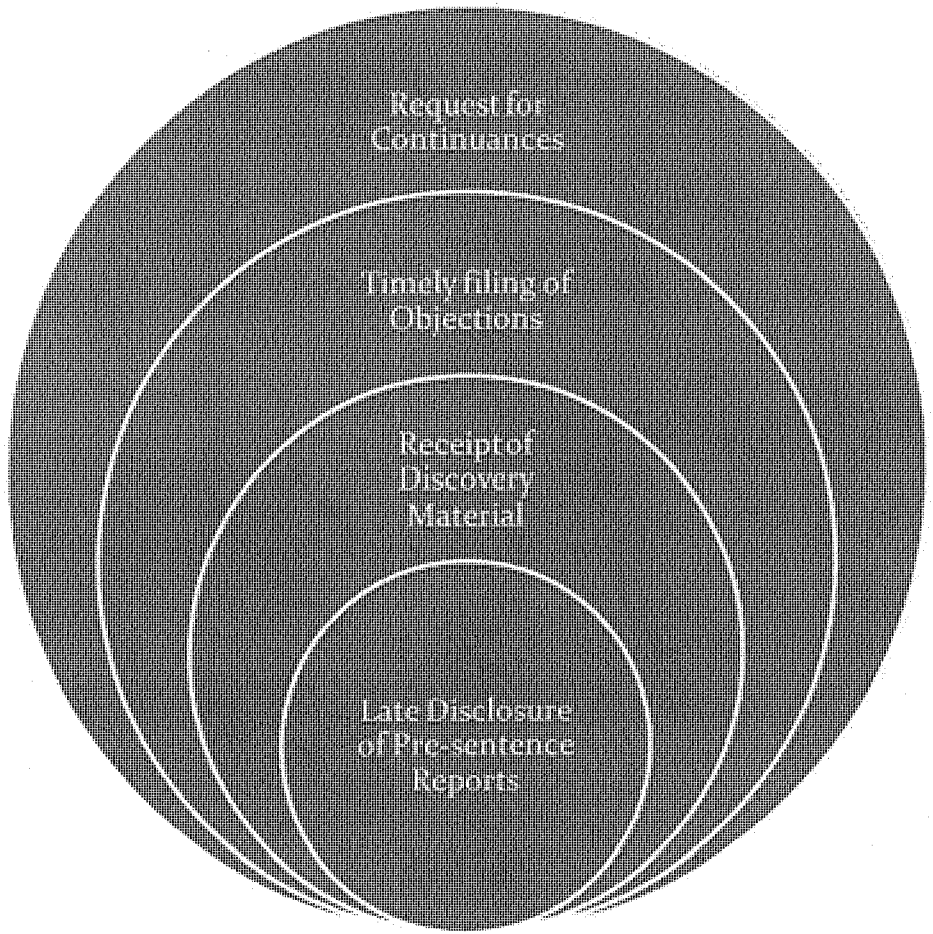
- Breaking the cycle of a return to a poor lifestyle
- Increased motivation of offender
- Able to make significant payment towards criminal fines and restitution

Offender Revocation in WD/WA 4/1/05 – 4/1/06



IMPEDIMENTS TO SWIFT PUNISHMENT

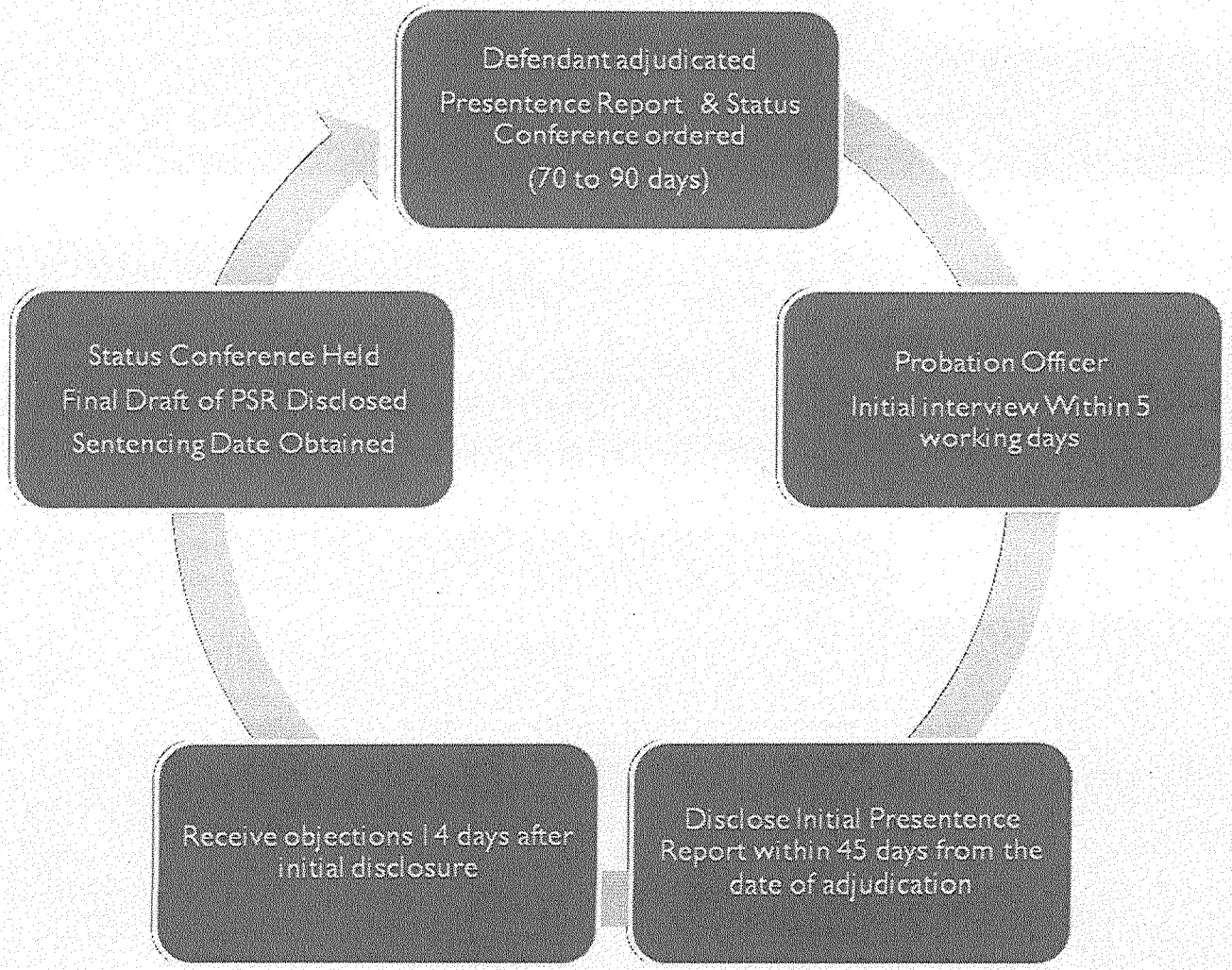
What are some barriers?



Why should we be concerned?

- County Time is "Hard Time"
- Past & Future Accountability
- Facilitation of Justice

Presentence Report Disclosure Process



FEDERAL PRACTICE POINTERS

PRESENTED BY

Robert Dopf and Kelly Mahoney
Former Assistant U.S. Attorneys
and current CJA Panel Members

Federal Criminal Law and Procedure

Fall 2007 Seminar

Federal Practice Pointers

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Tips and Thoughts for Handling Federal Criminal Cases:

1. **Charging Process.**

   Cases have been reviewed by at least two prosecuting attorneys before being charged. General issues that have been examined during this review include: strength of the evidence, issues for suppression of evidence, witness issues and the likely sentencing guideline range for the defendant. Upon being appointed to a case, take a fresh look at these issues to see what you are dealing with.

2. **Obtain a Case Overview.**

   CM-ECF allows for easy review of all court filings and upcoming hearing dates, as well as attorney contact information and co-defendants involved.

   Contact the prosecutor to check on the case status and obtain an overview of the case. You can also ask if the investigation is ongoing or at and end and if additional charges are being considered. The amount of information garnered will likely depend upon the prosecutor, but it is worth a try and may save time getting up to speed.

   Contact the former defense attorney, if applicable, for the same information.

3. **Detention Hearings.**

   Determine if the prosecution is seeking to detain your client pending trial. Detention hearings are set very quickly after arrest and initial appearance. Be aware that some prosecutors take the stance that if your client requests a detention hearing the prosecutor will not offer a cooperation plea agreement down the road. Although you can obtain some discovery through a detention hearing, it will be limited as the hearing will likely be conducted through a summary witness, such as the case agent. (The same is true for a preliminary hearing).

4. **Reviewing Discovery.**

   Depending upon the prosecutor, discovery may range from:
   - you receiving copies of all discovery for your file, to
   - reviewing all discovery at the US Attorney's Office.

   Discovery review is generally arranged through the prosecutor or

else their legal assistant (check with the prosecutor to determine).

Dictation equipment may or may not be allowed if you are required to review discovery at the US Attorney's Office – check with the prosecutor before going to review discovery.

You may be asked or required to sign a Discovery Order before receiving or reviewing discovery (depending upon the prosecutor).

3. **Investigation of the Case.**

Ask the prosecutor if any additional discovery is forthcoming and/or if the investigation is ongoing. If additional discovery is forthcoming or likely to be added, it may be a good idea to determine whether the prosecutor will automatically update you as discovery is added, or if you'll be required to periodically check on the status of any new discovery.

5. **Plea Negotiations.**

If a plea has been discussed, the prosecutor will provide a proposed plea agreement, generally with a cover letter that includes the prosecutor's Sentencing Guideline calculations.

Plea agreements are generally non-negotiable. In federal criminal cases, unlike many state criminal cases, the plea agreement will usually require a plea to the highest charged offense rather than allowing a plea to a lesser offense(s).

- You can attempt to reach a plea agreement to a lesser charge, but this argument generally works best (if at all) when the facts are in your client's favor (rather than arguing every time in every case for a plea to a lesser offense).

- You can look at negotiating other issues, such as a reduced drug quantity or a two-level increase in the guideline range for possession of a firearm rather than the five-year statutory minimum on a charge of a firearm in connection with a drug trafficking crime (18 U.S.C. § 924(c)). (That being said, a 924(c) charge will generally not be dismissed, but it may be worth a shot depending upon the facts in the case and the prosecutor).

- If mitigating factors are applicable in the case, try to stipulate to them in the plea agreement rather than having to argue for their applicability at sentencing. If the applicability of mitigating factors are questionable, it may be best to leave well enough alone and try to argue for them at sentencing rather than pressing for them to be stipulated to in the plea agreement. This is especially true if the prosecutor didn't include aggravating factors in a plea agreement that may be supported by the evidence.

- The prosecutor may or may not seek to have as many sentencing factors nailed down as possible in the plea agreement. This may or may not work in your favor so negotiate accordingly.

It is a good idea in the very beginning of the case to see if the investigation is ongoing and if additional charges are being considered (being able to gain this information will of course depend upon the prosecutor). It may be that additional charges are possible or likely but were not included in the original indictment in order to facilitate a plea agreement [From the prosecutor's perspective it may be easier to charge conservatively in the original indictment and negotiate a plea as charged, rather than charging all possible offenses up front and trying to get approval for a plea agreement that dismisses several charges]. Therefore, it may be in your client's best interest (assuming there is a factual basis and no issues such as suppression of evidence), to enter a plea sooner rather than later in the case.

6. Cooperation.

The general process of obtaining a cooperation plea agreement begins with a proffer interview. The prosecutor provides you with a proffer letter (generally what is said will not be used against your client). The case agent will write a report summarizing the proffer interview and confer with the prosecutor to determine if your client has information that could be used. If so, a cooperation plea agreement will be extended.

Generally cooperation plea agreements contain a provision that a proffer interview or debriefing does not constitute substantial

assistance to warrant a substantial assistance motion. Keep tabs on everything your client does for cooperation (such as interviews, grand jury testimony, any proactive cooperation, etc.) so that you'll be able to fully advise the Court at sentencing.

You should check with the prosecutor prior to sentencing to determine if a substantial assistance motion is being filed, and if so what reduction is being recommended.

7. **Trial Dates.**

The prosecutor will likely want to know that a trial is going to trial, or else have a motion to continue filed two weeks prior to the scheduled trial date. You can expect telephone calls accordingly a few weeks before trial.

Cases are generally continued to the next month's trial setting (the period generally commencing the first two weeks of each month). If you know that you will not have a plea hearing set by that date, or will not be able to try the case at that time, specify the date or time period you wish the trial to be continued to rather than having to get it continued again the following month.

4. **Sentencing Issues.**

Know your client's criminal history – past convictions may trigger provisions such as Armed Career Criminal status or a higher mandatory minimum drug sentences for prior drug felony convictions. It's important to be aware of these factors as **early in the case** as possible as they will impact how you proceed in the case.

Calculate the sentencing range and compare with the prosecutor's Guideline calculations.

Look for any aggravating or mitigating circumstances in discovery and in your investigation of the case.

Best of luck and have fun!

PRETRIAL PUBLICITY

PRESENTED BY

Montgomery Brown
CJA Panel Member

Eileen Wixted

Eileen is a strategic communications veteran with core competencies in the nuclear and health care industries. As a strategist and communication trainer, she has helped clients navigate brand damaging issues as well as prepared clients to face hostile media and government investigations.

In the nuclear industry, Eileen is well known for helping clients succeed during Federal Emergency Management Agency and Nuclear Regulatory Commission Evaluated Exercises. In addition, Eileen works with nuclear clients on several issues including reactor coolant leaks, corrosion, equipment failures, plant scrams, and employee related mishaps. Under Eileen's direction, WPNT works with two-thirds of all commercially owned and operated nuclear power plants in the United States.

Medical errors, the nursing shortage and health care business practices are major issues facing the health care industry. Eileen works closely with clients developing strategies to manage the myriad of issues that emerge on a weekly basis.

Prior to starting Wixted Pope Nora Thompson & Associates, Eileen spent more than a decade as a broadcast journalist and is the recipient of an Emmy Award. Eileen is a graduate of Michigan State University with a degree in mass communications. She is a native of Brooklyn, New York.

Pre-Trial Publicity Hypothetical

After a tumultuous election in November of 2008 that saw the Democrats take over the Presidency, newly appointed U.S. Attorney's are quickly nominated by the Senate and confirmed by President Everest Hillary. Word spreads fast in the legal community that "new Sheriffs are in town" and a reckoning is due.

The new U.S. Attorney's for the Southern and Northern District of Iowa assemble a task force to investigate claims of "Voter Caging" as violations of federal election laws. The technique employed has been called "voter caging" in which the political party sends registered letters to registered Democratic voters. When the voter fails to respond or the letter is returned undeliverable, the party challenges the voter's registration as fraudulent. On the day of the election, when the voter appears to vote, a Republican operative challenges the validity of the voter's registration. In other instances, the selected voters were sent letters in advance of the election by the Republican Party announcing their intent to challenge the voter's registration. Complaints that the technique had been employed were raised in the press shortly after the election. It is claimed that the most common targets were Hispanic, African-American and white suburban Democratic voters. The *CountyView* gossip column in February of 2009 reports that "the feds" are investigating and that "Republican" county auditors in three cities as well as party election officials, conspired to suppress votes by suggesting, encouraging and facilitating the caging technique. The U.S. Attorneys appear at joint press conference in March of 2009 to announce that Republican Party operatives and the auditors allegedly engaged in an organized effort to suppress Democratic-registered voters in Council Bluffs, Sioux City, Cedar Rapids. Within weeks, grand jury

subpoenas in Des Moines are sent out to witnesses and "subjects". One such "subject", Gamble Johnson, "takes the Fifth" and refuses to testify until he receives formal immunity from the district court. Outside the courthouse in Des Moines, he burns his immunity letter from the U.S. Attorney's Office. In each of the three cities, Democratic "turnout" was down 5.5%. In Council Bluffs and Sioux City, Republican candidates carried all challenged seats for the State legislature and U.S. House of Representatives. In Sioux City, Representative Leven Queen (R-SUX) wins re-election by 2%. Representative Queen claims victory due to his stand in favor of "amnesty". In fact, he claims, any "caging" hurt his campaign as he was counting on cross-over voters who favored his stand on more lenient immigration policies. As appearances are made before the grand jury in Sioux City, Representative Queen's campaign manager, Stall Foottap, is fingered as a "target". His attorney, Wade Stance, denies that Stall has received a "target letter" and claims his client will cooperate fully if asked to appear before the grand jury. By April of 2009 he gets his wish. The day before his testimony, Mr. Stance notifies the U.S. Attorney for the Northern District of Iowa, Monica Rove, that his client will take the Fifth. Rumors circulate that the real target is Representative Queen himself, as the orchestrator of the caging scheme in his district. Representative Queen's attorney Deano Weinparrish declares that his client will fight the accusations until the last drop of blood of the vindictive Democrats is spilled. Out of the blue, Hispanic packing house workers picket the federal courthouse in Sioux City chanting "Viva la Queen". Meanwhile in Des Moines, FBI Agent s and U.S. Attorney make a surprise raid on Republican headquarters, carting off dozens of boxes with labels declaring "Operation Voter Freedom". The press was notified in advance. Within hours, Gamble Johnson is subjected to the "perp-walk" in front of the courthouse. U.S.

Attorney Alfredo "Bring me the head of" Garcia seeks detention pending trial on the grounds that a special county election is required in Polk County in the fall of 2009 because the County Attorney has been accused of negligently supervising the expenditure of "Youthful Offender Program" funds. Johnson is released. The next day, the *CountyView* files a open records request for information from the Sheriff relating to a 911 call from Johnson's "boyfriend' alleging apparently that he had been kidnapped for several hours by unknown abductees wearing "Nixon" masks. Johnson's attorney tells the press that his client was never a fan of President Nixon.

"BONDAGE, REMOVAL, RAIDS, ICE MEN, BARS TO ADMISSION... AND YES, WE'RE TALKING IMMIGRATION"

PRESENTED BY

Angela Campbell and Priscilla Forsyth
CJA Panel Members

Deportability Statute

INA: ACT 237 - GENERAL CLASSES OF DEPORTABLE ALIENS

Sec. 237 1/ [8 U.S.C. 1227]

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status.-

(A) Inadmissible aliens.-Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) 2/ Present in violation of law.-Any alien who is present in the United States in violation of this Act or any other law of the 2b/ United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i) , is deportable.

(C) Violated nonimmigrant status or condition of entry.-

(i) Nonimmigrant status violators.-Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248 , or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry.-Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 212(g) is deportable.

(D) Termination of conditional permanent residence.-

(i) In general.-Any alien with permanent resident status on a conditional basis under section 216 (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 216A (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception.-Clause (i) shall not apply in the cases described in section 216(c)(4) (relating to certain hardship waivers).

(E) Smuggling.-

(i) In general.-Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or

aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification.-Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has en couraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized.-The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was **3/** the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law. **4/**

(F) [repealed] **5/**

(G) Marriage fraud.-An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section **212(a)(6)(C)(i)**) and to be in the United States in violation of this Act (within the meaning of subparagraph (B)) if-

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such entry of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the imm igration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) WAIVER AUTHORIZED FOR CERTAIN MISREPRESENTATIONS. -- The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who-

(i) **5a/** (I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) **5a/** was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

(ii) 5a/ 5aa/ is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses.-

(A) General crimes.-

(i) Crimes of moral turpitude.-Any alien who-

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed.

(ii) Multiple criminal convictions.-Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony.-Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High Speed Flight.-Any alien who is convicted of a violation of section 758 of title 18, United States Code, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) 5b/ FAILURE TO REGISTER AS A SEX OFFENDER- Any alien who is convicted under section 2250 of title 18, United States Code, is deportable.

(vi) 5b/ Waiver authorized.-Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances.-

(i) Conviction.-Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts.-Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses.-Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

(D) Miscellaneous crimes.-Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate-

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18, United States Code;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section **215** or **278** of this Act, is deportable.

(E) **6/** Crimes of Domestic violence, stalking, or violation of protection order, crimes against children and.-

(i) Domestic violence, stalking, and child abuse.-Any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person sha res a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders.-Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued fo r the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(3) Failure to register and falsification of documents.-

(A) Change of address.-An alien who has failed to comply with the provisions of section 265 is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents.- Any alien who at any time has been convicted-

(i) under section 266(c) of this Act or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other entry documents), is deportable.

(C) *7/* Document fraud.-

(i) In general.-An alien who is the subject of a final order for violation of section 274C is deportable.

(ii) Waiver authorized.-The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section **274C** and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) *8/* FALSELY CLAIMING CITIZENSHIP-

(i) IN GENERAL- Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act (including section **274A**) or any Federal or State law is deportable.

within the sole discretion of the Attorney General.

(b) An alien, admitted as an nonimmigrant under the provisions of either section **101(a)(15)(A)(i)** or **101(a)(15)(G)(i)**, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State, unless such alien is subject to deportation under paragraph (4) of subsection (a).

(c) Paragraphs (1)(A), (1)(B), (1)(C), (1)(D), and (3)(A) of subsection (a) (other than so much of paragraph (1) as relates to a ground of inadmissibility described in paragraph (2) or (3) of section 212(a)) shall not apply to a special immigrant described in section 101(a)(27)(J) based upon circumstances that existed before the date the alien was provided such special immigrant status.

(d) **10/**

Inadmissibility Statute

INA: ACT 212 - GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILLITY

Sec. 212. [8 U.S.C. 1182]

(a) Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.-

(A) In general.-Any alien-

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) 1/ except as provided in subparagraph (C) 1a/ who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Comm ittee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

(B) Waiver authorized.-For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) 1/ EXCEPTION FROM IMMUNIZATION REQUIREMENT FOR ADOPTED CHILDREN 10 YEARS OF AGE OR YOUNGER.--Clause (ii) of subparagraph (A) shall not apply to a child who--

(i) is 10 years of age or younger,

(ii) is described in section 101(b)(1)(F) , and

(iii) is seeking an immigrant visa as an immediate relative under section 201(b) ,

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) Criminal and related grounds.-

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement 2/ were 5 years or more is inadmissible.

(C) 2a/ CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissaible.

(D) Prostitution and commercialized vice.-Any alien who-

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution.-Any alien-

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h)),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense, is inadmissible.

(F) Waiver authorized.-For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

2b/ 2c/ (G) FOREIGN GOVERNMENT OFFICIALS WHO HAVE COMMITTED PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM- Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402), is inadmissible.

(H) 2bb / SIGNIFICANT TRAFFICKERS IN PERSONS-

(i) IN GENERAL- Any alien who is listed in a report submitted pursuant to section 111 (b) of the Trafficking Victims Protection Act of 2000, or who the consular officer or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 103 of such Act, is inadmissible.

(ii) BENEFICIARIES OF TRAFFICKING- Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse,

or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) EXCEPTION FOR CERTAIN SONS AND DAUGHTERS- Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

2bbb/ (I) MONEY LAUNDERING- Any alien--

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds.-

(A) In general.-Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in-

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is inadmissible.

(B) Terrorist activities-

(i) 3/ 4/ 4a/ IN GENERAL.-Any alien who-

(I) has engaged in a terrorist activity,

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in

any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of--

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18, United States Code) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

4/ (ii) EXCEPTION- Subclause (VII) of clause (i) does not apply to a spouse or child--

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

4/ (iii) TERRORIST ACTIVITY DEFINED.-As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if 4/ it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of

any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and

threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any-

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, 4/ firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) 4/ 4b/ ENGAGE IN TERRORIST ACTIVITY DEFINED- As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization-

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for--

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

5/ (v) REPRESENTATIVE DEFINED.-As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) 5a/ 4c TERRORIST ORGANIZATION DEFINED- As used in clause (i)(VI) and clause (iv), the term 'terrorist organization' means an organization--

(I) designated under section 219 ;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy.-

(i) In general.-An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials.-An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations wo uld be lawful within the United States.

(iii) Exception for other aliens.-An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations.-If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party.-

(i) In general.-Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership.- Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership.-Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that-

(I) the membership or affiliation terminated at least-

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members.-The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) 5aaa/ PARTICIPANTS IN NAZI PERSECUTION, GENOCIDE, OR THE COMMISSION OF ANY ACT OF TORTURE OR EXTRAJUDICIAL KILLING

(i) Participation in nazi persecutions.-Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with-

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide.-Any alien who 5aaa/ ordered, incited, assisted, or otherwise participated in conduct outside the United States that would, if committed in the United States or by a United States national, be genocide, as defined in section 1091(a) of title 18, United States Code, is inadmissible.

(iii) 5aaa/ COMMISSION OF ACTS OF TORTURE OR EXTRAJUDICIAL KILLINGS-Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of--

(I) any act of torture, as defined in section 2340 of title 18, United States Code; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

5aa/ (F) ASSOCIATION WITH TERRORIST ORGANIZATIONS- Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(4) Public charge.-

(A) In general.-Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible. 6/

(B) Factors to be taken into account.- (i) In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's-

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and

financial status; and

(V) educaltion and skills

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 213A for purposes of exclusion under this paragraph.

(C) Family-Sponsored immigrants.-Any alien who seeks admission or adjustment of status under a visa issued under section 201(b)(2) or 203(a) is excludable under this paragraph unless-

(i) the alien has obtained-

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) or section 204(a)(1)(A) , or

(II) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B); 6aa/

(III) 6aa/ classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission 6a/ (and any additional sponsor required under section 213A(f) or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 213A with respect to such alien.

(D) Certain employment-based immigrants.-Any alien who seeks admission or adjustment of status under a visa number issued under section 203(b) by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is excludable under this paragraph unless such relative has executed an affidavit of support described in section 213A with respect to such alien.

(5) Labor certification and qualifications for certain immigrants.-

(A) Labor certification.-

(i) In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(ii) Certain aliens subject to special rule.-For purposes of clause (i)(I), an alien described in this clause is an alien who-

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(iii) 7/ PROFESSIONAL ATHLETES-

(I) In general.-A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for certification.

(II) Definition.-For purposes of subclause (I), the term "professional athlete" means an individual who is employed as an athlete by-

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(iv) 7/ LONG DELAYED ADJUSTMENT APPLICANTS- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

(B) Unqualified physicians.-An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as dete rmined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) Uncertified foreign health-care workers 7a/ Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that-

(i) the alien's education, training, license, and experience-

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test, or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) Application of grounds.-The grounds of inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 203(b) .

(6) Illegal entrants and immigration violators.-

(A) 8/ ALIENS PRESENT WITHOUT admission or parole.-

(i) In general.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for certain battered women and children.-Clause (i) shall not apply to an alien who demonstrates that-

(I) the alien is a VAWA self-petitioner; 6aa/

(II)(a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family resi ding in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

(B) Failure to attend removal proceeding.-Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

(C) Misrepresentation.-

(i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(ii) 9/ FALSELY CLAIMING CITIZENSHIP-

(I) IN GENERAL- Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

(II) EXCEPTION- In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien

reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (I).

(D) Stowaways.-Any alien who is a stowaway is inadmissible.

(E) Smugglers.-

(i) In general.-Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification.-Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (d)(11).

(F) Subject of civil penalty.-

(i) In general.-An alien who is the subject of a final order for violation of section 274C is inadmissible.

(ii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (d)(12). 10/

(G) Student visa abusers.-An alien who obtains the status of a nonimmigrant under section 101(a)(15)(F)(i) and who violates a term or condition of such status under section 214(l) is excludable until the alien has been outside the United States for a continuous period of 5 years after the date of the violation. 11/

(7) Documentation requirements.-

(A) Immigrants.-

(i) In general.-Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission-

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a), or

(II) whose visa has been issued without compliance with the provisions of section 203, is inadmissible.

(ii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (k).

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission, is inadmissible.

(ii) General waiver authorized.-For provision authorizing waiver of clause (i), see subsection (d)(4).

(iii) Guam visa waiver.-For provision authorizing waiver of clause (i) in the case of visitors to Guam, see subsection (l).

(iv) VISA WAIVER 11a/ PROGRAM.-For authority to waive the requirement of clause (i) under a 11a/ program, see section 217 .

(8) Ineligible for citizenship.-

(A) In general.-Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) Draft evaders.-Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) 12/ ALIENS PREVISOUSLY Removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who

seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) 13/ ALIENS UNLAWFULLY PRESENT.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244 (e)) prior to the commencement of proceedings under section 235(b)(1) or section 240 , and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,is inadmissible.

(ii) Construction of unlawful presence.-For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.-

(I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (I).

(II) Asylees.-No period of time in which an alien has a bona fide application for asylum pending under section 208 shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family unity.-No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 14/ shall be taken into account in determining the period of unlawful presence in the United States under clause (I).

(IV) Battered women and children.-Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(V) 13a/ VICTIMS OF A SEVERE FORM OF TRAFFICKING IN PERSONS- Clause (i) shall not apply to an alien who demonstrates that the severe form of trafficking (as that term is defined in section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102)) was at least one central reason for the alien's unlawful presence in the United States.

(iv) Tolling for good cause.-In the case of an alien who-

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1) , section 240 , or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.-Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, 14a/ 6aa/ the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) 6aa/ WAIVER- The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

(10) 15/ MISCELLANEOUS.-

(A) Practicing polygamists.-Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) Guardian required to accompany helpless alien.-Any alien-

(i) who is accompanying another alien who is inadmissible and who is certified to be

helpless from sickness, mental or physical disability, or infancy pursuant to section 232(c) , and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (I), is inadmissible. 16/

(C) International child abduction.-

(i) In general.-Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is inadmissible until the child is surrendered to the person granted custody by that order.

16a / (ii) ALIENS SUPPORTING ABDUCTORS AND RELATIVES OF ABDUCTORS. -- Any alien who--

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to return to the United States or such person's place of residence.

(iii) EXCEPTIONS. -- Clauses (i) and (ii) shall not apply--

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) 17/ UNLAWFUL VOTERS-

(i) IN GENERAL- Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) EXCEPTION- In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently

resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violatio n that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) Former citizens who renounced citizenship to avoid taxation.-Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is excludable. 18/

Citizenship Statute

INA: ACT 316 - REQUIERMENTS AS TO RESIDENCE, GOOD MORAL CHARACTER, ATTACHMENT TO THE PRINCIPLES OF THE CONSTITUTION, AND FAVORABLE DISPOSITION TO THE UNITED STATES

Sec. 316. [8 U.S.C. 1427]

(a) No person, except as otherwise provided in this title, shall be naturalized, unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

(b) Absence from the United States of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the application for naturalization, or during the period between the date of filing the application and the date of any hearing under section **336(a)**, shall break the continuity of such residence, unless the applicant shall establish to the satisfaction of the Attorney General that he did not in fact abandon his residence in the United States during such period.

Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the application for naturalization) shall break the continuity of such residence except that in the case of a person who has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year and who thereafter, is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation, or is employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence, no period of absence from the United States shall break the continuity of residence if-

(1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the dev elopment of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries of such firm or corporation, or to be employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after

being lawfully admitted for permanent residence; and

(2) such person proves to the satisfaction of the Attorney General that his absence from the United States for such period has been for such purpose.

The spouse and dependent unmarried sons and daughters who are members of the household of a person who qualifies for the benefits of this subsection shall also be entitled to such benefits during the period for which they were residing abroad as dependent members of the household of the person.

(c) The granting of the benefits of subsection (b) of this section shall not relieve the applicant from the requirement of physical presence within the United States for the period specified in subsection (a) of this section, except in the case of those persons who are employed by, or under contract with, the Government of the United States. In the case of a person employed by or under contract with Central Intelligence Agency, the requirement in subsection (b) of an uninterrupted period of at least one year of physical presence in the United States may be complied with by such person at any time prior to filing an application for naturalization.

(d) No finding by the Attorney General that the applicant is not deportable shall be accepted as conclusive evidence of good moral character.

(e) In determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the Attorney General shall not be limited to the applicant's conduct during the five years preceding the filing of the application, but may take into consideration as a basis for such determination the applicant's conduct and acts at any time prior to that period.

(f) (1) Whenever the Director of Central Intelligence, the Attorney General and the Commissioner of Immigration determine that an applicant otherwise eligible for naturalization has made an extraordinary contribution to the national security of the United States or to the conduct of United States intelligence activities, the applicant may be naturalized without regard to the residence and physical presence requirements of this section, or to the prohibitions of section **313** of this Act, and no residence within a particular State or district of the Service in the United States shall be required: Provided, That the applicant has continuously resided in the United States for at least one year prior to naturalization: Provided further, That the provisions of this subsection shall not apply to any alien described in clauses (i) through (v) of section **208(b)(2)(A)** of this Act.

(2) An applicant for naturalization under this subsection may be administered the oath of allegiance under section **337(a)** by any district court of the United States, without regard to the residence of the applicant. Proceedings under this subsection shall be conducted in a manner consistent with the protection of intelligence sources, methods and activities.

(3) The number of aliens naturalized pursuant to this subsection in any fiscal year shall not exceed five. The Director of Central Intelligence shall inform the Select Committee on Intelligence and the Committee on the Judiciary of the Senate and the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives within a reasonable time prior to the filing of each application under the provisions of this subsection.

Definition of Good Moral Character

INA §101(f) – DEFINITION OF GOOD MORAL CHARACTER

(f) For the purposes of this Act-No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is or was--

(1) a habitual drunkard;

(2) stricken by Sec. 2(c)(1) of Pub. L. 97-116.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and 18c/ (10)(A) of section 212(a) of this Act; or subparagraphs (A) and (B) of section 212(a)(2) and subparagraph (C) thereof of such section (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana); if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43)). The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character; or 18b/

(9) 18b/ one who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).

Consequences

Selected Immigration Consequences of Certain Federal Offenses

by Dan Kesselbrenner
and Sandy Lin
of the National Immigration Project of the National Lawyers Guild
on behalf of the Defending Immigrants Partnership

Introduction

1. **Using the Chart.** The chart analyzes adverse immigration consequences that flow from conviction of selected federal offenses and suggests how to avoid the consequences. The chart is organized numerically by code section.

2. **Sending comments about the Chart.** We will update and expand the chart in 2004. Contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses to be analyzed, want to propose other alternate "safer" pleas, want to suggest improvements, or have general comments. Send email to sandy@nationalimmigrationproject.org. This address will not answer legal questions.

3. **Disclaimer and Note to Users.** Immigration consequences of crimes are a complex, unpredictable, and constantly changing area of law where there are few guarantees. Practitioners should use this chart as a starting point rather than as a substitute for legal research. For a more detailed analysis of offenses and arguments, see *Immigration Law and Crimes* available at the National Immigration Project.

Acknowledgements

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Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
8 U.S.C. § 1324(a)(1)(A)	Harboring, smuggling, and transporting	Yes, under 8 U.S.C. § 1101(a)(43)(N). Statutory exception for first offense for assisting, abetting, or aiding one's spouse, child, or parent.[1]	Unlikely.[2]	Yes, under smuggling ground for bringing in offense.	
8 U.S.C. § 1325 (a)	Illegal entry	Yes, under 8 U.S.C. § 1101(a)(43)(O) when person convicted was previously deported for an aggravated felony conviction other than illegal entry or reentry.[3]	No.	n/a	
8 U.S.C. § 1326	Illegal reentry	Yes, under 8 U.S.C. § 1101(a)(43)(O) when person convicted was previously deported for an aggravated felony conviction other than illegal entry or reentry.	No.[4]	n/a	
18 U.S.C. § 3	Accessory after the fact	Yes, under obstruction of justice ground.[5]	Possibly, if the underlying offense involves moral turpitude.[6]	Not a controlled substance offense.[7]	Consider a plea to misprision of felony, if possible.

[1] *Matter of Ruiz-Romero*, 22 I & N Dec. 486 (BIA 1999) (holding that parenthetical reference limiting aggravated felony to only smuggling is "merely descriptive" rather than limiting); *United States v. Galindo-Gallegos*, 244 F.3d 1154 (9th Cir. 2001); *Gavilan-Cuate v. Yetter*, 276 F.3d 418 (8th Cir. 2002); *Patel v. Ashcroft*, 294 F.3d 465 (3d Cir. 2002) (ignoring parenthetical and treating harboring conviction as an aggravated felony); *Castro-Espinoza v. Ashcroft*, 257 F.3d 1130 (9th Cir. 2001) (same).

[2] *Matter of Tiwari*, 19 I & N Dec. 875 (BIA 1989).

[3] *Matter of Alvarado-Alvino*, 22 I & N Dec. 718 (BIA 1998) (holding not an aggravated felony conviction where defendant had no prior conviction); *Rivera-Sanchez v. Reno*, 198 F.3d 545 (5th Cir. 1999) (same).

[4] *Rodriguez v. Campbell*, 8 F.2d 983 (5th Cir. 1925).

[5] *Matter of Batista-Hernandez*, 21 I & N Dec. 955 (BIA 1997) (holding that accessory to drug trafficking offense is not a controlled substance offense).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
18 U.S.C. § 4	Misprision of felony	No.[8]	Possibly.[9]	Not a conviction under controlled substance ground even where felony concealed involves drug distribution.[10]	
18 U.S.C. § 111	Assaulting, resisting, or impeding certain officers or employees	Yes, crime of violence if the defendant receives a sentence of a year or more.[11]	Very likely.[12]	n/a	
18 U.S.C. § 113	Assaults within maritime and territorial jurisdiction	Possibly a crime of violence if the defendant receives a sentence of a year or more, except 18 U.S.C. § 113(a)(5) for simple assault, which is punishable by not more	Divisible offense. Simple assault is not a crime involving moral turpitude.	n/a	

[6] *Cabral v. INS*, 15 F.3d 193 (1st Cir. 1994) (holding that accessory to murder is a crime involving moral turpitude); *Matter of Sanchez-Marin*, 11 I& N Dec. 264 (BIA 1965) (holding that a conviction for accessory to manslaughter is a crime involving moral turpitude).

[7] *Matter of Batista-Hernandez*, 21 I & N Dec. 955 (BIA 1997).

[8] *Matter of Espinoza-Gonzalez*, 21 I & N Dec. 291 (BIA 1999).

[9] *Compare Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) (holding conviction under 18 U.S.C. § 4 is a crime involving moral turpitude; *Matter of Giraldo-Valencia*, A26 520 954 (BIA Index Dec. Oct 22, 1992) (distinguishing between common law and statutory misprision offenses in holding that federal misprision under 18 U.S.C. § 4 is a crime involving moral turpitude) *with Matter of S-C-*, 3 I & N Dec. 350 (BIA 1949) (holding that common law crime of misprision of felony is not a crime involving moral turpitude).

[10] *See Matter of Velasco*, 16 I & N Dec. 281 (BIA 1977); *Castaneda De Esper v. INS*, 557 F.2d 79 (6th Cir. 1977) (holding that conviction for 18 U.S.C. § 4 of conspiracy to possess heroin is not conviction relating to possession or traffic in narcotic drugs under former 8 U.S.C. § 1251(a)(11)).

[11] The simple assault provision is a misdemeanor that requires the defendant to act "forcibly." An offense of this character may satisfy the crime of violence definition under 18 U.S.C. § 16(a).

[12] *Matter of Danesh*, 19 I & N Dec. 669 (BIA 1988).

[13] *Compare Matter of Martin*, 23 I & N Dec. 491 (BIA 2002) (holding that a Connecticut conviction for third degree is a crime of violence) *with Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003) (holding that a Connecticut conviction for third degree is not a crime of violence).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		than six months.[13]			
18 U.S.C. § 201(b)	Bribery of public officials and witnesses	Possibly an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) for commercial bribery where the defendant receives a sentence of a year or more. It is not clear that bribing a public official necessarily includes a commercial element.	Yes.[14]	n/a	Try to ensure that the record of conviction does not include any evidence that the bribery was commercial in nature.
18 U.S.C. § 371	Conspiracy to commit offense or to defraud United States	Yes, fraud aggravated felony offense where loss exceeds $10,000.[15]	Yes, where underlying offense involves moral turpitude or where offense involves fraud.[16]	Firearm, controlled substance, or other criminal ground where underlying offense would make a noncitizen deportable.[17]	If possible, plead to conspiracy to commit an offense that does not involve fraud or trigger other immigration consequences.
18 U.S.C. § 373	Solicitation to commit crime of violence offense	Probably crime of violence aggravated felony where defendant receives a sentence of a	Probably.	n/a	

[14] *See, e.g., Okabe v. INS*, 671 F.2d 863 (5th Cir. 1982); *Matter of H*, 6 I & N Dec. 358 (BIA 1954).

[15] *See, e.g., Bejacmar v. Ashcroft*, 291 F.3d 735 (2002) (regarding conviction for conspiracy to commit bank fraud); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (regarding conviction for conspiracy to export firearms without a license).

[16] *See Jordan v. De George*, 341 US 223 (1951) (treating as a crime involving moral turpitude any conviction for an offense that has fraud as an essential element).

[17] *See, e.g., Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (holding that conviction for conspiracy to export firearms is a firearm offense because it involves a conspiracy to commit a firearm offense).

[18] Although solicitation to commit a controlled substance offense is not a drug trafficking aggravated felony in the Ninth Circuit, it is not clear that reasoning would apply to the crime of violence ground. See *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		year or more.[18]			
18 U.S.C. § 401	Criminal contempt	Unlikely.[19]	Unlikely.	n/a	
18 U.S.C. § 472	Uttering counterfeit obligations or authorities	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.[20]	Yes.[21]	n/a	
18 U.S.C. § 473	Dealing in counterfeit obligations or securities	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.	Yes.[22]	n/a	
18 U.S.C. § 474	Possessing counterfeit securities	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.	Not necessarily.[23]	n/a	
18 U.S.C. § 485	Possessing counterfeit coins	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.	Not necessarily.[24]	n/a	Divisible statute.
18 U.S.C. § 487	Possessing U.S. coin molds with intent to defraud	Yes, under fraud ground if loss to victim exceeds $10,000 or probably under counterfeiting	Yes.[25]	n/a	Try to plead to 18 U.S.C. § 485.

19 *United States v. Galin*, 217 F.3d 847 (9th Cir. 2000) (holding that charge under 18 U.S.C. § 401(3) does not require finding of obstruction of justice).

20 *See Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000).

21 *Lozano-Giron v. INS*, 506 F.2d 1073 (7th Cir. 1974); *Matter of Lethbridge*, 11 I & N Dec. 444 (BIA 1965).

22 *Matter of Martinez*, 16 I & N Dec. 336 (BIA 1977).

23 *Matter of Lethbridge*, 11 I & N Dec. 444 (BIA 1973).

24 *Matter of K*, 7 I & N Dec. 178 (BIA 1956).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		ground if the defendant receives a sentence of a year or more.			
18 U.S.C. § 494	Counterfeiting and Forgery	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 513(a)	Securities of the States and private entities	Possibly.[26]	Possibly.	n/a	
18 U.S.C. § 545	Smuggling goods into the U.S.	Probably under fraud ground if loss to the victim exceeds $10,000. The offense is possibly an aggravated felony under the theft ground if the defendant receives a sentence of a year or more.	Possibly.[27]	Not necessarily controlled substance ground where record of conviction does not indicate type of merchandise.[28]	The statute includes knowingly bringing into the United States any merchandise contrary to law, which appears to be the least likely offense under 18 U.S.C. § 545 to trigger immigration consequences.

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[25] *Matter of K*, 7 I & N Dec. 178 (BIA 1956) (involving conviction under former 18 U.S.C. § 283).

[26] *Compare Sui v. INS*, 250 F.3d 105 (2d Cir. 2001) (holding that knowingly and unlawfully possessing counterfeit securities with the intent to deceive another is not an aggravated felony) *with Wilson v. INS*, 2001 U.S. Dist. LEXIS 19903 (M.D. Pa. 2001)(holding that conviction under 18 U.S.C. §§ 371 and 513(a) for conspiracy to utter and possess forged and counterfeit securities is an aggravated felony).

[27] *Compare Eyoum v. INS*, 125 F.3d 889 (5th Cir. 1997) (holding that conviction for importation of pancake turtles is not a crime involving moral turpitude) *with Matter of D*, 9 I & N Dec. 602 (BIA 1962) (holding that smuggling liquor with intent to defraud U.S. is a crime involving moral turpitude).

[28] *See U.S. v. Garcia-Paz*, 282 F.3d 1212 (9th Cir. 2002) (holding it is not a requirement that defendant know the type of merchandise defendant is importing).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
18 U.S.C. § 656	Theft, embezzlement, or misapplication by bank officer or employee	Possibly.[29]	Yes.[30]	n/a	*See Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002) for possible strategy to avoid treatment as an aggravated felony.
18 U.S.C. § 758	High speed flight from immigration checkpoint	Unlikely.	Unlikely.	Yes, separate ground of deportability under 8 U.S.C. § 1327(a)(2)(A)(iv).	
18 U.S.C. § 793	Gathering, transmitting or losing defense information	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Possibly.	Possibly, under national security ground.	
18 U.S.C. § 798	Disclosing classified information	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Probably.	Possibly, under national security ground.	
18 U.S.C. § 842(h)	Offenses related to explosive materials	Yes, under 8 U.S.C. § 1101(a)(43)(E)(i).	Possibly.	Yes, under firearm ground.	
18 U.S.C. § 843(b)	Use of a communication facility	Yes, under drug trafficking ground.[31]	Possibly.	Yes, under controlled substance ground.	
18 U.S.C. §§ 844(d)-(i)	Explosives	Yes, under 8 U.S.C. § 1101(a)(43)(E)(i).	Probably.[32]	n/a	
18 U.S.C. § 875	Interstate communications	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably.	n/a	

[29] *Compare Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001) (holding that conviction of misapplication of bank funds constituted an aggravated felony because crime necessarily involved fraud or deceit) *with Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002) (holding that conviction for embezzling in excess of $400,000 in cash and checks from bank employer was not an aggravated felony where record was inconclusive regarding intent).

[30] *Matter of Batten*, 11 I & N Dec. 271 (BIA 1965).

[31] *United States v. Orihuela*, 320 F.3d 1302 (11th Cir. 2003).

[32] There is a small possibility that 18 U.S.C. §§ 844(g) and (h) would not involve moral turpitude. For a person charged with using or carrying an explosive in the commission of a federal felony pursuant to 18 U.S.C. § 844(h), the defendant should plead to committing a felony that does not involve moral turpitude, if possible.

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
18 U.S.C. § 876	Mailing threatening communications	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably.	n/a	
18 U.S.C. § 877	Mailing threatening communications from foreign country	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably.[33]	Possibly under international child abduction ground.	
18 U.S.C. § 911	False claim to U.S. citizenship	Unlikely to be an aggravated felony.	Probably.[34]	Yes, under false claim to citizenship ground.	
18 U.S.C. § 912	Impersonation	Yes, under theft ground if defendant receives a sentence of a year or more or under fraud ground if loss to the victim exceeds $10,000.	Yes.[35]	n/a	
18 U.S.C. §§ 922(g)(1), (2), (3), (4), or (5)(j), (n), (o), (p), (r)	Firearms offenses	Yes, under 8 U.S.C. § 1101(a)(43)(E)(ii).	Depends on section.	Yes, under firearm ground.	
18 U.S.C. § 922(g)(5)	Unlawful possession or transportation of a firearm by certain noncitizens	Yes, under 8 U.S.C. § 1101(a)(43)(E).	Unlikely.	Yes, under firearm ground.	
18 U.S.C. §§ 922(j), (n), (o), (p), (r)	Firearms offenses	Yes, under 8 U.S.C. § 1101(a)(43)(E).	Depends on section.	Yes, under firearm ground.	
18 U.S.C. § 924(h)	Transfer of a firearm for certain unlawful purposes	Yes, under 8 U.S.C. § 1101(a)(43)(E).	Possibly if record specifies unlawful purpose and unlawful purpose involves moral turpitude.	Yes, under firearm ground and possibly also under controlled substance ground.	

[33] *Matter of P*, 5 I & N Dec. 444 (BIA 1953) (interpreting conviction under the predecessor statute as a crime involving moral turpitude).

[34] *Compare White v. INS*, 6 F.3d 1312 (8th Cir. 1993) (treating conviction as a crime involving moral turpitude) *with Matter of I*, 4 I & N Dec. 159 (BIA 1950) (holding that conviction under former 8 U.S.C. § 746(18) does not involve moral turpitude).

[35] *Matter of B*, 6 I & N Dec. 702 (BIA 1955); *Matter of Gonzalez*, 16 I & N Dec. 134 (BIA 1977).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
18 U.S.C. § 871	Threats against the President	Likely to be a crime of violence if defendant receives a sentence of a year or more.	Likely.	Yes, under miscellaneous crimes ground.	
18 U.S.C. § 960	Expedition against friendly nation	Possibly.	Not necessarily.	Yes, under miscellaneous crimes ground.	
18 U.S.C. § 1001	False statements	Unlikely.	Possibly.[36]	n/a	Pleading to a simple false statement is the least likely to trigger adverse immigration consequences.
18 U.S.C. § 1014	False statement on loan application	Yes, under theft offense ground if defendant receives a sentence of a year or more.[37]	Possibly.[38]	n/a	Pleading to a false non-material statement is the least likely to be a crime involving moral turpitude.
18 U.S.C. § 1028(a)	Fraud and related activity in connection with identification documents and information	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds $10,000.	Yes, for those offenses for which fraud is an essential element.	n/a	Divisible statute.
18 U.S.C. § 1029(a)	Fraud and related activity in connection	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where	Yes, all subsections involve "intent to	n/a	

[36] Section 1001(a)(2) of 18 U.S.C. is not necessarily a conviction for a crime involving moral turpitude. *See Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962) (holding that a conviction under predecessor statute 18 U.S.C. § 80 did not necessarily involve moral turpitude because a simple false statement does not necessarily involve fraud); *Matter of Marchena*, 12 I & N Dec. 355 (BIA 1967).

[37] *See United States v. Dabeit*, 231 F.3d 979 (5th Cir. 2000) (involving conviction under 18 U.S.C. §§ 1014 and 2113(b) for check kiting conspiracy). Section 1014 of 18 U.S.C. may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) also. *Sharma v. Ashcroft*, 158 F.Supp.2d 519 (E.D.Pa 2001) (interpreting conviction for making false statements on loan application).

[38] Since materiality is not an element of the offense, a false statement that is not material would not be a conviction for a crime involving moral turpitude. *See Matter of Marchena*, 12 I & N 355 (BIA 1967) (determining that false statement under 18 U.S.C. § 1001, before it had a materiality element, did not necessarily involve moral turpitude).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
	with access devices	loss exceeds $10,000. Depending on the subsection, an offense may constitute an aggravated felony theft offense if defendant receives a sentence of a year or more.	defraud."		
18 U.S.C. § 1036	Entry by false pretenses to any real property, vessel, or aircraft of the United States or secure area of any airport	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds $10,000.	Yes, if defendant admits to using a fraudulent pretense.	n/a	
18 U.S.C. § 1071	Concealing person from arrest	Unlikely.	Yes.[39]	n/a	A plea to misprision of felony might be less likely to involve moral turpitude.[40]
18 U.S.C. § 1111	Murder	Yes, under murder aggravated felony ground.	Yes.	n/a	
18 U.S.C. § 1112	Manslaughter	Yes, under crime of violence ground if defendant receives a sentence of a year or more, unless defendant	Yes.[42]	n/a	If defendant pleads to an offense that involves negligently taking life of another, it might prevent

[39] *Matter of Sloan*, 12 I & N Dec. 840 (BIA 1966, AG 1968).

[40] *See Matter of S-C-*, 3 I & N Dec. 350 (BIA 1949) (holding that common law crime of misprision of felony is not a crime involving moral turpitude *Compare Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) (holding conviction under 18 U.S.C. § 4 is a crime involving moral turpitude) *with Matter of Giraldo-Valencia*, A26 520 954 (BIA Index Dec. Oct 22, 1992) (distinguishing between common law and statutory misprision offenses in holding federal misprision under 18 U.S.C. § 4 is a crime involving moral turpitude).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		convicted of death caused by negligence.[41]			offense from being a crime of violence.
18 U.S.C. § 1113	Attempt to commit murder	Yes, under 8 U.S.C. § 1101(a)(43)(U) if defendant convicted of attempted murder.	Yes.	n/a	
18 U.S.C. § 1201	Kidnapping	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Yes.	n/a	
18 U.S.C. § 1202	Ransom proceeds	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably.	n/a	
18 U.S.C. § 1341	Mail fraud	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds $10,000.	Yes.	n/a	Investigate pleading to an offense under 18 U.S.C. § 1342 that involves use of mail for unlawful purpose other than fraud or deceit.
18 U.S.C. § 1342	Fictitious name or address	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds $10,000 and where underlying offense involves fraud or deceit.	Yes, if defendant pleads to section that requires a fraudulent intent. It is possible to commit offense by using mail for an unlawful purpose other than fraud.	n/a	Plead to use of mail for unlawful purpose other than fraud or deceit.
18 U.S.C. § 1343	Fraud by wire, radio, or television	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i) where	Yes.	n/a	

[41] *Compare Park v. INS*, 252 F.3d 1018 (9th Cir 2001) (holding a state involuntary manslaughter requiring a mental state of recklessness to be a crime of violence); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002) (holding that state vehicular homicide is a crime of violence under 18 U.S.C. § 16(b)); *Matter of Alcantar*, 20 I & N Dec. 801 (BIA 1994) (same) *with Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001) (applying categorical approach in holding that state conviction for unintentional vehicular homicide was not a crime of violence under 18 U.S.C. §16(b)); *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (requiring at least a mental state of recklessness for an offense to be a crime of violence under 18 U.S.C. §16(b)).

[42] *Matter of Franklin*, 20 I&N 867 (BIA 1994).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		loss exceeds $10,000.			
18 U.S.C. § 1344	Bank fraud	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i) where loss exceeds $10,000.	Yes.	n/a	See *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) for discussion on calculating "loss to victim."
18 U.S.C. § 1426(b)	Reproduction of naturalization or citizenship papers	Unlikely.	Yes.[43]	Possibly, under false claim to citizenship ground.	
18 U.S.C. § 1503	Influencing or injuring officer or juror generally	Likely, under 8 U.S.C. § 1101(a)(43)(S).	Yes.[44]	n/a	
18 U.S.C. § 1510	Obstruction of justice	Yes, under obstruction of justice ground if defendant receives a sentence of a year or more.	Probably.	n/a	Consider plea to misprision of felony.
18 U.S.C. § 1542	False statement in application and use of passport	Possibly, under 8 U.S.C. § 1101(a)(43)(P) where defendant receives a sentence of a year or more.	Yes.[45]	Yes, under false claim to citizenship ground.	
18 U.S.C. § 1543	Forgery or false use of passport	Aggravated felony under 8 U.S.C. § 1101(a)(43)(P) where defendant receives a sentence of a year or	Probably.	Yes, under false claim to citizenship ground.	The statute creates an exception for a first offense in which a noncitizen aided only his or her spouse,

[43] *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980).
[44] *Knoetze v. U.S. Dept. of State*, 634 F.2d 207 (5th Cir. 1981).
[45] *Bisaillon v. Hogan*, 257 F.2d 435 (9th Cir. 1958); *Matter of B*, 7 I & N Dec. 342 (BIA 1956).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		more.			child, or parent. If applicable, ensure that the record of conviction reflects that crime relates to family member covered by exception. Consider a possible plea under 18 U.S.C. § 1542, which is not enumerated as an aggravated felony offense under 8 U.S.C. § 1101(a)(43)(P).
18 U.S.C. § 1546(a)	Fraud and misuse of visas, permits, and other documents	Yes, under § 1101(a)(43)(P) where sentence imposed is at least one year.	Yes. [46]	A conviction for violating 18 U.S.C. § 1546(a) is a separate ground of deportability under 8 U.S.C. § 1227(a)(3)(B)(iii).	The aggravated felony definition creates an exception for a first offense in which a noncitizen aided only his or her spouse, child, or parent. If applicable, ensure that the record of conviction reflects that crime relates to family member covered by exception.
18 U.S.C. § 1581	Peonage	Yes, under ground	Yes.	n/a	

[46] *See Matter of Serna*, 20 I & N Dec. 579 (1992) (holding that offense involves moral turpitude only if record of conviction reflects that defendant intended to use the document).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		"relating to peonage, slavery, and involuntary servitude."			
18 U.S.C. § 1582	Vessels for slave trade	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1583	Enticement into slavery	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1584	Sale into involuntary servitude	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1585	Seizure, detention, transportation or sale of slaves	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1588	Transportation of slaves from United States	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1621	Perjury generally	Yes, under 8 U.S.C. § 1101(a)(43)(S).	Yes.	n/a	Consider plea to 18 U.S.C. § 1001 if possible.
18 U.S.C. § 1622	Subornation of perjury	Yes, under 8 U.S.C. § 1101(a)(43)(S).	Yes.	n/a	
18 U.S.C. § 1708	Theft or receipt of stolen mail matter generally	Yes, under 8 U.S.C. § 1101(a)(43)(G) where defendant receives a	Yes.[48]	n/a	

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		sentence of a year or more.[47]			
18 U.S.C. § 1952	Interstate and foreign travel or transportation in aid of racketeering enterprises.	Yes, under drug trafficking ground where record of conviction established that underlying offense involved distribution of a controlled substance.[49]	Probably.	Possibly, under controlled substance ground where record of conviction establishes that underlying conduct involved a controlled substance.[50]	If possible, have record of conviction reflect that underling offense did not involve distribution of a controlled substance.
18 U.S.C. § 1955	Prohibition of illegal gambling businesses	Yes, under 8 U.S.C. § 1101(a)(43)(J) where potential sentence of one year exists.	Probably.	n/a	
18 U.S.C. § 1956(a)(1)(A)	Laundering of money instruments	Yes, under money laundering grounds if amount of funds exceeds $10,000.[51]	Probably.	n/a	Investigate whether there is a factual basis to plead to structuring transactions to avoid a reporting requirement in violation of 31 U.S.C. § 5322(b).
18 U.S.C. § 1956(h)	Yes, under money laundering ground.	Yes, under 8 U.S.C. § 1101(a)(43)(D) when amount of funds exceeds	Probably.	n/a	Investigate whether there is a factual basis to plead to

[47] *Randhawa v. Ashcroft*, 298 F.3d 1148 (9th Cir. 2002).

[48] *Okoroha v. INS*, 715 F.2d 380 (8th Cir. 1983); *Matter of F*, 7 I & N Dec. 386 (BIA 1957) (holding that comparable state statute involved moral turpitude).

[49] *Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003); *United States v. Rodriguez-Duberney*, 326 F.3d 613 (5th Cir. 2003).

[50] *Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003); *Johnson v. INS*, 971 F.2d 340 (9th Cir. 1992) (holding that conviction under 18 U.S.C. § 1952 was a controlled substance offense).

[51] *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (rejecting government attempt to include restitution amount as measure of funds laundered).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		$10,000.			structuring transactions to avoid a reporting requirement in violation of 31 U.S.C. § 5322(b).
18 U.S.C. § 1957	Engaging in monetary transactions in property derived from specified unlawful activity	Yes, under 8 U.S.C. § 1101(a)(43)(D) when amount of funds exceeds $10,000.	Probably.	n/a	
18 U.S.C. § 1962	Racketeer influenced corrupt organizations (RICO) offenses	Yes, under 8 U.S.C. § 1101(a)(43)(J) where potential sentence of one year exists.	Probably.	Possibly, depending on underlying offense.	
18 U.S.C. § 2113(b)	Bank robbery and incidental crimes.	Yes, under theft or crime of violence ground if defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 2114	Mail theft	Yes, under theft ground if defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 2241	Aggravated sexual abuse	Yes, under rape ground. Also a crime of violence if the defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 2242	Sexual abuse	Yes, under rape ground. Also a crime of violence if the defendant receives a sentence of a year or	Yes.	n/a	

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		more.			
18 U.S.C. § 2251	Sexual exploitation of children	Yes under sexual abuse of minor ground aggravated felony, regardless of sentence imposed, under 8 U.S.C. § 1101(a)(43)(I).	Yes.	Yes, under domestic violence ground.	
18 U.S.C. § 2251A	Selling or buying of children	Yes, under sexual abuse of minor ground aggravated felony, regardless of sentence imposed, under 8 U.S.C. § 1101(a)(43)(I).	Yes.	Yes, under domestic violence ground.	
18 U.S.C. § 2252	Certain activities relating to material involving the sexual exploitation of minors	Yes, under sexual abuse of minor ground aggravated felony, regardless of sentence imposed, under 8 U.S.C. § 1101(a)(43)(I).	Yes.	Yes, under domestic violence ground.	
18 U.S.C. §§ 2261	Interstate domestic violence	Possibly crime of domestic violence if defendant receives a sentence of a year or more.	Probably.[52]	Yes, under domestic violence ground.	
18 U.S.C. §§ 2262	Interstate violation of protection order	Possibly crime of domestic violence if defendant receives a sentence of a year or more.	Probably.	Yes, under domestic violence ground.	
18 U.S.C. § 2312	Transportation of stolen vehicles	Yes, under receipt of stolen property ground.	Yes.	n/a	
18 U.S.C. § 2313	Sale or receipt of	Possibly an aggravated	Likely, depending on	n/a	

[52] *See Matter of Tran*, 21 I. & N. Dec. 291 (BIA 1996).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
	stolen vehicles	felony under the theft ground if the defendant receives a sentence of a year or more or under the fraud or deceit ground if the loss to the victim exceeds $10,000	the crime committed.		
18 U.S.C. § 2314	Transportation of stolen goods	Yes, if loss to victim exceeds $10,000.	Yes, here fraud is element of the offense.[53]	n/a	The offense that is least likely to trigger immigration consequences under 18 U.S.C. § 2313 would be transporting a falsely made security knowing the same to be a false that is made with an unlawful intent.
18 U.S.C. § 2381	Treason	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Yes.	Yes, under national security grounds.	
18 U.S.C. § 2382	Misprision of treason	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Very likely.	Yes, under national security grounds.	
18 U.S.C. § 2421	Transportation of minors, generally	Yes, under ground relating to transportation for the purpose of prostitution if committed for commercial advantage.[54]	Yes.	Yes, under domestic violence ground.	Try to avoid finding in record that offense involved commercial advantage.
18 U.S.C. § 2422	Coercion and enticement of minors	Yes, under ground relating to transportation	Yes.	Yes, under domestic violence ground.	Try to avoid finding in record that offense

[53] *See United States v. Castro*, 26 F.3d 557 (5th Cir. 1994).

[54] *See* 8 U.S.C. § 1101(a)(43)(K)(ii).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		for the purpose of prostitution if committed for commercial advantage.			involved commercial advantage.
18 U.S.C. § 2423	Transportation of minors	Yes, under ground relating to transportation for the purpose of prostitution if committed for commercial advantage.	Yes.	Yes, under domestic violence ground.	Try to avoid finding in record that offense involved commercial advantage.
18 U.S.C. § 2701(a)(1)	Unlawful access to stored communication	Possibly a theft offense if defendant receives a sentence of a year or more.	Probably not.	n/a	
18 U.S.C. § 3146	Penalty for failure to appear	Yes, under 8 U.S.C. § 1101(a)(43)(T) if the crime for which the defendant did not appear is a felony punishable by two years or more.	Probably not.	n/a	
18 U.S.C. § 3607	First Offender Act.	No.	No.	No.	
18 U.S.C. § 5031-5042	Juvenile Delinquency	No.	No.	No.	
19 U.S.C. § 1593	Smuggling merchandise	Probably not.	Yes.[55]	n/a	
20 U.S.C. § 1097(a)	Student loan fraud	Yes, fraud offense if loss to the victim exceeds $10,000 or under theft ground where sentence is a year or more.	Yes, where fraud is element of offense.[56]	n/a	

[55] *Matter of De S*, 1 I & N Dec. 553 (BIA 1943).

[56] *Kabongo v. INS*, 837 F.2d 753 (6th Cir. 1988) (holding conviction for offense is a crime involving moral turpitude); *Izedonmwen v. INS*, 37 F.3d 416 (8th Cir. 1994) (same).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
21U.S.C. § 333(b)	Prescription drug marketing violations	Yes, under drug trafficking ground.	Yes.[57]	Yes, under controlled substance ground.	
21 U.S.C. § 841(a)	Manufacture, distribution, or possession with intent to distribute	Yes, under drug trafficking ground.	Yes.[58]	Yes, under controlled substance ground.	
21 U.S.C. § 841(c)	Offenses involving listed chemicals	Yes, under drug trafficking ground.	Possibly.[59]	Yes, under controlled substance ground.	
21 U.S.C. §§ 841(f)(1), (2)	Wrongful distribution or possession of listed chemicals	Yes, under drug trafficking ground.	Possibly.	Yes, under controlled substance ground.	
21 U.S.C. § 842(b)	Manufacture of a controlled substance	Yes, under drug trafficking ground.	Possibly.	Yes, under controlled substance ground.	
21 U.S.C. § 843(b)	Communication facility	Yes, under drug trafficking ground.[60]	Possibly.	Yes, under controlled substance ground.	
21 U.S.C. § 846	Attempt and conspiracy to violate controlled substance laws.	Yes, if the underlying offense is a felony except for the Third Circuit.[61]	Possibly, depending on the subsection that the defendant violated.	Yes, under controlled substance ground.	
21 U.S.C. § 849(b)	Distribution or possession for sale within 1,000 feet of a truck stop or rest area	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 854(a)	Investment of illicit drug profits	Yes, under drug trafficking ground.	Possibly.	Yes, under controlled substance ground.	
21 U.S.C. § 856	Establishment of	Yes, under drug	Possibly.[62]	Yes, under controlled	

[57] *Matter of P*, 6 I & N Dec. 795 (BIA 1955).
[58] *See, e.g., Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).
[59] *See Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).
[60] *United States v. Orihuela*, 320 F.3d 1302 (11th Cir. 2003).
[61] *Compare Matter of Yanez*, 23 I & N Dec. 390 (BIA 2002) *with Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
	manufacturing operations	trafficking ground.		substance ground.	
21 U.S.C. § 859	Distribution to persons under age twenty-one	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 860	Distribution or manufacturing in or near schools and colleges	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 860(c)	Employing children to distribute drugs near schools or playgrounds	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 861	Employment or use of persons under 18 years of age in drug operations	Yes, under drug trafficking ground.	Possibly.[63]	Yes, under controlled substance ground.	
21 U.S.C. § 861(a)(3)	Receipt of a controlled substance from a person under 18 years of age.	Yes, under drug trafficking ground.	Possibly.[64]	Yes, under controlled substance ground.	
21 U.S.C. § 861(f)	Distribution of controlled substance to pregnant individual	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 863(a)	Trafficking in drug paraphernalia	Yes, under drug trafficking ground.	Possibly.[65]	Yes, under controlled substance ground.	
21 U.S.C. § 952(a)	Importation of controlled substances	Yes, under drug trafficking ground.	Probably.	Yes, under controlled substance ground.	

[62] *See Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).
[63] *Id.*
[64] *Id.*
[65] *Id.*

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
21 U.S.C. § 953(a)	Exportation of controlled substances	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 959(a)	Possession, manufacture, or distribution of controlled substance	Yes, under drug trafficking ground.	Yes, if offense involves distribution.[66]	Yes, under controlled substance ground.	
26 U.S.C. § 2803(a)	Conspiracy to transport spirits without tax stamps	No.	No.[67]	No.	
26 U.S.C. § 5861	Firearm offenses	Yes, under 8 U.S.C. § 1101(a)(43)(E)(iii).	Probably not.	Yes, under firearm ground.	
31 U.S.C. § 5322	Criminal violation of banking regulations	No.	No.[68]	n/a	
31 U.S.C. § 5324	Structuring financial transactions to evade reporting requirement and related offenses	Unlikely.	No.[69]	n/a	
42 U.S.C. § 408	Reporting false Social Security number	Yes, under fraud or deceit ground when loss to the victim exceeds $10,000.[70]	Possibly.[71]	n/a	
50 U.S.C. § 421	Revealing identity of certain United States	Yes, under 8 U.S.C. §§ 1101(a)(43)(L)(ii), (iii).	Probably.	n/a	

[66] *Id.*

[67] *Matter of G*, 7 I & N Dec. 114 (BIA 1956).

[68] *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (conviction under 31 U.S.C. §§ 5322(b), 5324(a)(3) not a crime involving moral turpitude.); *Matter of L-V-C-*, 22 I & N Dec. 594 (BIA 1999) (same).

[69] *Matter of L-V-C-*22 I & N Dec. 594 (BIA 1999).

[70] *St. John v. Ashcroft*, 43 Fed. Appx. 281 (10th Cir.2002) (rejecting argument that restitution amount was not equivalent to loss to victim).

[71] *Compare Matter of Adetiba*, 20 I & N Dec. 506 (BIA 1992) (finding that conviction involves moral turpitude) *with Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (relying on limited statutory amnesty for people who present false social security cards to conclude that the offense is not a conviction for a crime involving moral turpitude).

Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
	undercover intelligence officers, agents, informants, and sources				
50 U.S.C. App. § 462	Evading draft	No.	Not a crime involving moral turpitude.[72]	n/a	

[72] *Matter of S*, 5 I & N Dec. 425 (BIA 1953).

Publications

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CORPORATE COMPLIANCE PROGRAMS, THE MCNULTY MEMORANDUM, AND THE "ETHICS" OF THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT: WINDOW DRESSING OR REAL CHANGE?

PRESENTED BY

John Fatino
CJA Panel Member

IOWA COURT RULES

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Iowa R of Prof'l Conduct 32:1.13 (2007)

Review Court Orders which may amend this Rule

RULE 32:1.13 Organization as client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not rule 32:1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that the lawyer has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 32:1.7. If the organization's consent to the dual representation is required by rule 32:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other

constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 32:1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 32:1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 32:1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in rule 32:1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by rule 32:1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 32:1.8, 32:1.16, 32:3.3, or 32:4.1. Paragraph (c) of this rule supplements rule 32:1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of rule 32:1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rules 32:1.6(b)(2) and 32:1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances rule 32:1.2(d) may also be applicable, in which event, withdrawal from the representation under rule 32:1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee, or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that the lawyer has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope

[18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and ensuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to

the organization and the lawyer's relationship with the board. In those circumstances, rule 32:1.7 governs who should represent the directors and the organization. **HISTORY:** [Court Order April 20, 2005, effective July 1, 2005]

IOWA COURT RULES

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Iowa R of Prof'l Conduct 32:4.4 (2007)

Review Court Orders which may amend this Rule

RULE 32:4.4 Respect for rights of third persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. For example, present or former organizational employees or agents may have information protected by the attorney-client evidentiary privilege or the work product doctrine of the organization itself. If the person contacted by the lawyer has no authority to waive the privilege, the lawyer may not deliberately seek to obtain the information in this manner.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See rules 32:1.2 and 32:1.4.

HISTORY: [Court Order April 20, 2005, effective July 1, 2005]

IOWA COURT RULES

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT
ADVOCATE

Iowa R of Prof'l Conduct 32:3.4 (2007)

Review Court Orders which may amend this Rule

RULE 32:3.4 Fairness to opposing party and counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. The law may make it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. The law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, the law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including loss of time in attending or testifying, or to compensate an expert witness on terms permitted by law. It is improper to pay an occurrence witness any fee other than as authorized by law for testifying and it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another

party, for the employees may identify their interests with those of the client. See also rule 32:4.2.

HISTORY: [Court Order April 20, 2005, effective July 1, 2005]

IOWA COURT RULES

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT
ADVOCATE

Iowa R of Prof'l Conduct 32:3.8 (2007)

Review Court Orders which may amend this Rule

RULE 32:3.8 Special responsibilities of a prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows or reasonably should know is not supported by probable cause;

(b) make reasonable efforts to ensure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information; and

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 32:3.6 or this rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. See generally ABA Standards of Criminal Justice Relating to the Prosecution Function. Applicable law may require other measures by the prosecutor, and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of rule 32:8.4.

[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence. In addition, paragraph (c) does not apply to a defendant charged with a simple misdemeanor for which the prosecutor reasonably believes the defendant will not be incarcerated.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest. For purposes of paragraph (d), evidence tending to negate the guilt of the accused includes evidence that tends

to impeach a witness for the State.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements rule 32:3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with rule 32:3.6(b) or 32:3.6(c) and with rule 32:3.6(e).

[6] Like other lawyers, prosecutors are subject to rules 32:5.1 and 32:5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

HISTORY: [Court Order April 20, 2005, effective July 1, 2005]

IOWA COURT RULES

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Iowa R of Prof'l Conduct 32:4.1 (2007)

Review Court Orders which may amend this Rule

RULE 32:4.1 Truthfulness in statements to others

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 32:1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 32:8.4.

Statements of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under rule 32:1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in rule 32:1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation, or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 32:1.6.

HISTORY: [Court Order April 20, 2005, effective July 1, 2005]

IOWA COURT RULES

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Iowa R of Prof'l Conduct 32:4.2 (2007)

Review Court Orders which may amend this rule.

RULE 32:4.2 Communication with person represented by counsel

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 32:1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited-representation lawyer as to the subject matter within the limited scope of representation.

Comment

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 32:8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 32:3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See rule 32:4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See rule 32:1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 32:4.3.

HISTORY: [Court Order April 20, 2005, effective July 1, 2005; March 12, 2007]

IOWA COURT RULES

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Iowa R of Prof'l Conduct 32:4.3 (2007)

Review Court Orders which may amend this Rule

RULE 32:4.3 Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see rule 32:1.13(f).

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

HISTORY: [Court Order April 20, 2005, effective July 1, 2005]

United States Sentencing Commission Amends Chapter 8 of the Sentencing Guidelines: A Primer on the New Requirements

John F. Fatino*

Introduction

In recent years, public stock exchanges in the United States have been rocked by corporate crime. Initially formulated in 1991 by the United States Sentencing Commission [hereinafter "Commission"], Chapter 8 of the United States Sentencing Guidelines [hereinafter "Guidelines"] structures the sentencing of corporations and other business organizations convicted of felony or Class A misdemeanor offenses under federal law.[1] Even before the recent waive of corporate failures and indictments, the Commission had begun examining ways to make Chapter 8 of the Guidelines more effective.[2] The Commission's Ad Hoc Advisory Group on the Organizational Sentencing Guidelines subsequently recommended a number of changes to Chapter 8 of

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[1] U.S. SENTENCING GUIDELINES MANUAL, § 8A1.1 (2003) [hereinafter MANUAL].
[2] David Rovella, *Enron Fallout: Sentencing Reformers*, NAT'L L.J., Mar. 8, 2002, at A15.

the Guidelines. Following the receipt of testimony from the public, the Advisory Group sent its report to the Commission on October 7, 2003.

On December 30, 2003, the Commission gave notice to the public of a proposed amendment.[3] The proposed amendment to Chapter 8 was set out in a compendium of pending amendments.[4] The Commission described the "Reason for the Amendment" as a response to the Sarbanes-Oxley Act of 2002, Public Law 107-204, which directed the Commission to review and amend, as appropriate, the Guidelines and related policy statements to ensure that their "sufficien[cy] to deter and punish organizational misconduct." As Congress did not reject them, the amendments have been adopted with an effective date of November 1, 2004.

Counsel and officers for organizations will want to closely examine these new provisions. As one commentator has noted, the use of the term "Guidelines" is a misnomer because, at the end of day, they are policies that are structured to dramatically decrease judicial discretion.[5] Given the turmoil created by *United States v. Booker*,[6] which rendered the Guidelines advisory, corporations (and their counsel) should view the Guidelines as mandatory features of every corporate compliance program until the courts hold otherwise.

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[3] 68 F.R. 75340, 2003 WL 23021302 (Dec. 20, 2003).
[4] *Available at* www.ussc.gov. The final version of the amendment was submitted to Congress in May, 2004.
[5] Kathryn Keneally, *White Collar Crime*, CHAMPION, June 2004, at 36, 42.
[6] 125 S. Ct. 738 (2005).

This Article provides the reader with a primer on the amendment to Chapter 8. Part I presents an overview of Chapter 8 prior to its recent amendment. Part II delineates and clarifies the changes to Chapter 8. Concluding remarks follow in Part III.

I. Pre-Amendment Chapter 8

The design of Chapter 8 has resembled other provisions of the Guidelines.[7] First, the sentencing court determines the offense level.[8] Next, the court calculates a baseline.[9] At the same time, the "culpability" score is determined,[10] which partly depends upon whether the corporation had an effective program to prevent and detect violations of the law.[11] Third, the court establishes minimum and maximum multipliers.[12] From those factors, the sentencing court determines a minimum and maximum fine range.[13] Ultimately, the sentencing court imposes a sentence within this fine range and determines whether disgorgement, restitution, probation, and other remedial conduct should be imposed.[14]

Under the old methodology, the determination of whether the defendant had an effective program to prevent and detect violations of the

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[7] *See generally* John F. Fatino, *Corporate Compliance Programs: An Approach to Avoid or Minimize Criminal and Civil Liability*, 51 DRAKE L. REV. 81 (2002).
[8] MANUAL, § 8A1.2(b)(2)(B).
[9] MANUAL, § 8A1.2(b)(2)(C).
[10] MANUAL, § 8A1.2(b)(2)(D).
[11] MANUAL, § 8C2.5(f).
[12] MANUAL, § 8A1.2(b)(2)(E).
[13] MANUAL, § 8A1.2(b)(2)(F).
[14] MANUAL, §§ 8A1.2(a), 8A1.2(b)(2)(H), 8A1.2(c).

law rested upon a seven factor test.[15] First, the defendant organization must have established compliance programs and procedures reasonably likely to reduce criminal conduct. Second, specific individuals with high ranking authority in the organization must have been assigned ultimate responsibility to oversee the program. Third, the organization must have used "due care" not to place an individual in charge of the compliance program someone with a propensity for illegal conduct. Fourth, the organization must have taken steps to communicate the standards to employees and agents. Fifth, the defendant must have taken reasonable steps to monitor and achieve compliance with the program. Sixth, the standards set out in the program "must have been consistently enforced. . ." Seventh, and perhaps most importantly, after an offense has occurred, the organization took reasonable steps to respond and prevent similar violations in the future. Under the Guidelines, the adequacy of the program was measured by a scale that took into account the size of the organization, the likelihood of recurrent offenses because of the nature of the business, and the history of the organization.

Based upon the foregoing analysis, an organization could receive a three point reduction in its culpability score if it had in place an effective corporate compliance program.[16] Certain factors could permissibly negate

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[15] MANUAL, § 8A1.2 cmt. 3(k).
[16] MANUAL, § 8C2.5(f).

the three point reduction.[17] Self-reporting, cooperation, and acceptance of responsibility could warrant an additional five point reduction.[18]

II. The Amendment

A. The Commission's View—The New Guidelines

First, the amendment adds a new guideline, "Effective Compliance and Ethics Programs," under section 8B2.1. The amendment incorporates the existing seven steps for an effective compliance program into the new guideline at subsection (b). At the same time, the amendment will delete the existing commentary at section 8A1.2, comment 3(k).

In addition to focusing on a broader notion of the duty of an organization, section 8B2.1(a)(2) specifically requires the organization to promote a culture which "encourages ethical conduct and a commitment to compliance with the law."

Moreover, the amendment adds additional clarifying commentary at section 8B2.1. The additional comment defines "standards and procedures" as "standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct."

Second, at section 8B2.1(b)(2)(A) the guideline now requires that the governing authority of the organization (as specifically defined in the

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[17] *See, e.g.*, MANUAL, § 8C2.5(b)-(e) (involvement or tolerance of criminal activity, prior history, violation of an Order, and obstruction of justice).
[18] MANUAL, § 8C2.5(g).

guideline) must be "knowledgeable about the content and operation of the program. . . ." In turn, individuals with daily operational duties concerning the program "should, no less than annually, give the governing authority or appropriate subgroup. . . information on the implementation and effectiveness of the. . .program. . . ."[19] At the same time, section 8B2.1(b)(2)(C) requires that the individual responsible for compliance "be given adequate resources" and authority to carry out such responsibility. . ."

Third, the amendment abandons the requirement that the organization screen personnel for their propensity to engage in unlawful acts. Instead, the organization is required by section 8B2.1(b)(3) to use "reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew" or should have known had a history of illegal conduct or had engaged in violations inconsistent with the program.

Fourth, compliance training will be required[20] and applicable to both employees and upper-level management.[21]

Fifth, section 8B2.1(b)(5)(A) mandates monitoring and auditing to detect criminal conduct. Application Note 6 clarifies that this includes periodic evaluation of the program itself. Application Note 6 identifies risk

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[19] U.S. Sentencing Guidelines MANUAL § 8B2.1, Application Note 3 (2004) [hereinafter 2004 MANUAL].
[20] 2004 MANUAL § 8B2.1(b)(4)(A).
[21] 2004 MANUAL § 8B2.1(b)(4)(B).

assessment as a critical component of the effective program. The same commentary provides that the entity must modify the program in light of the potential risks which have been identified as a result of the risk assessment.

In that same vein, anonymous/confidential reporting systems must be in place under section 8B2.1(b)(5)(C). Also, the same section mandates internal monitoring systems be designed for both guidance and to report actual and potential criminal conduct. These programs must allow employees to seek assistance "without fear of retaliation."[22]

Sixth, the amendment expands internal enforcement mechanisms. In addition to discipline, section 8B2.1(b)(6)(A) specifically allows for incentives to act in accordance with the compliance program. Note further that section 8B2.1(b)(6)(B) now contemplates that persons should be disciplined for "failing to take *reasonable* steps to prevent or detect criminal conduct" (emphasis added).

Seventh, the amendment, like its predecessor, requires under section 8B2.1(b)(7) that the organization "take reasonable steps to respond appropriately to the criminal conduct, including making any necessary modifications to the. . .program."

The amendment also creates Part F of Chapter 8. This provision addresses violations of conditions of probation for organizations subject to Chapter 8.

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[22] 2004 MANUAL § 8B2.1(b)(4)(C).

B. The Commission's View—The Small Organization

Next, the amendment provides further commentary at Application Note 2(C)(iii) regarding the use of corporate compliance programs by small entities. Additional illustrations are provided. The Commission stated in its narrative concerning the "Reason for the Amendment" that it modified the culpability score at section 8C2.5(f) with the intent of helping small organizations previously excluded from a reduction in their culpability score because of the almost inevitable involvement of high-level personnel.

C. The Commission's View—The Old Formulae

The amendment does not change the three point reduction in the culpability score under section 8C2.5(f)(1) if the offense occurred despite the existence of an effective program. Likewise, section 8C2.5(f)(2) retains the language that forbids unreasonable delays in reporting the offense to appropriate governmental authorities. Section 8C2.5(f)(B) retains the rebuttable presumption that an effective program was not in place if high-level personnel were involved in the offense. Moreover, a reduction in the culpability score is still available for self-reporting under section 8C2.5(g)(1).

On a final note, the amendment, at section 8B2.1(a), maintains the language that the "failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective. . . ." Yet, unlike its predecessor, the amendment examines the program in light of

industry practice and governmental regulations, size of the organization, and similar misconduct.[23]

D. The Employment Dilemma

The mandates of compliance programs might create a conflict between the organization and an employee or officer. After all, termination is one of the best ways to demonstrate that the organization has responded appropriately to the offense and taken steps to prevent similar offenses. This conclusion is fortified by the Department of Justice's interpretive memorandum concerning "The Principles of Federal Prosecution of Business Organizations" n/k/a "The McNulty Memorandum." Yet, the Commission appears to be asserting that the Guidelines do not "trump" other regulations concerning the employment relationship. Application Note 4 to section 8B2.1 declares that "[n]othing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices."[24]

III. Conclusion

By being aware of the amendment, counsel and officers can understand what issues were inadequately addressed in the prior version of the guideline. At the same time, counsel and officers can begin to comprehend that the changes, while numerous, do not change the overall

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[23] 2004 MANUAL § 8B2.1, Application Note 2.
[24] *Available at* http://www.usdoj.gov/dag/cftf/corporate_Guidelines.htm.

design and function of Chapter 8. In any event, the organization must implement the required additional changes to prevent and detect criminal violations. At the very least, in the event "disaster strikes," the organization will be armed with the documentation to argue that it had in place an effective compliance and ethics program.

Amendments to the Sentencing Guidelines

May 18, 2006

This compilation contains unofficial text of amendments to the sentencing guidelines and is provided only for the convenience of the user. Official text of the amendments can be found on the Commission's website at www.ussc.gov and in the May 15, 2006, edition of the Federal Register (71 FR 28063).

13. Privilege Waiver

Reason for Amendment: *This amendment deletes the last sentence of Application Note 12 to §8C2.5 (Culpability Score), which stated that "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." The Commission added this sentence to address some concerns regarding the relationship between waivers and §8C2.5(g), and at the time stated that "[t]he Commission expects that such waivers will be required on a limited basis." See Supplement to Appendix C (Amendment 673, effective November 1, 2004). Subsequently, the Commission received public comment and heard testimony at public hearings on November 15, 2005, and March 15, 2006, that the sentence at issue could be misinterpreted to encourage waivers.*

Amendment:

§8C2.5. Culpability Score

* * *

Commentary

Application Notes:

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12. To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation. ~~Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.~~

CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

PART A - GENERAL APPLICATION PRINCIPLES

§8A1.1. Applicability of Chapter Eight

This chapter applies to the sentencing of all organizations for felony and Class A misdemeanor offenses.

Commentary

Application Notes:

1. *"Organization" means "a person other than an individual." 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.*

2. *The fine guidelines in §§8C2.2 through 8C2.9 apply only to specified types of offenses. The other provisions of this chapter apply to the sentencing of all organizations for all felony and Class A misdemeanor offenses. For example, the restitution and probation provisions in Parts B and D of this chapter apply to the sentencing of an organization, even if the fine guidelines in §§8C2.2 through 8C2.9 do not apply.*

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8A1.2. Application Instructions - Organizations

(a) Determine from Part B, Subpart 1 (Remedying Harm from Criminal Conduct) the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.

(b) Determine from Part C (Fines) the sentencing requirements and options relating to fines:

(1) If the organization operated primarily for a criminal purpose or primarily by criminal means, apply §8C1.1 (Determining the Fine - Criminal Purpose Organizations).

(2) Otherwise, apply §8C2.1 (Applicability of Fine Guidelines) to identify the counts for which the provisions of §§8C2.2 through 8C2.9 apply. For such counts:

(A) Refer to §8C2.2 (Preliminary Determination of Inability to Pay Fine) to determine whether an abbreviated determination of the guideline fine range may be warranted.

(B) Apply §8C2.3 (Offense Level) to determine the offense level from Chapter Two (Offense Conduct) and Chapter Three, Part D (Multiple Counts).

(C) Apply §8C2.4 (Base Fine) to determine the base fine.

(D) Apply §8C2.5 (Culpability Score) to determine the culpability score. To determine whether the organization had an effective compliance and ethics program for purposes of §8C2.5(f), apply §8B2.1 (Effective Compliance and Ethics Program).

(E) Apply §8C2.6 (Minimum and Maximum Multipliers) to determine the minimum and maximum multipliers corresponding to the culpability score.

(F) Apply §8C2.7 (Guideline Fine Range - Organizations) to determine the minimum and maximum of the guideline fine range.

(G) Refer to §8C2.8 (Determining the Fine Within the Range) to determine the amount of the fine within the applicable guideline range.

(H) Apply §8C2.9 (Disgorgement) to determine whether an increase to the fine is required.

For any count or counts not covered under §8C2.1 (Applicability of Fine Guidelines), apply §8C2.10 (Determining the Fine for Other Counts).

(3) Apply the provisions relating to the implementation of the sentence of a fine in Part C, Subpart 3 (Implementing the Sentence of a Fine).

(4) For grounds for departure from the applicable guideline fine range, refer to Part C, Subpart 4 (Departures from the Guideline Fine Range).

(c) Determine from Part D (Organizational Probation) the sentencing requirements and options relating to probation.

(d) Determine from Part E (Special Assessments, Forfeitures, and Costs) the sentencing requirements relating to special assessments, forfeitures, and costs.

Commentary

Application Notes:

1. *Determinations under this chapter are to be based upon the facts and information specified in the applicable guideline. Determinations that reference other chapters are to be made under the standards applicable to determinations under those chapters.*

2. *The definitions in the Commentary to §1B1.1 (Application Instructions) and the guidelines and commentary in §§1B1.2 through 1B1.8 apply to determinations under this chapter unless otherwise specified. The adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction), and E (Acceptance of Responsibility) do not apply. The provisions of Chapter Six (Sentencing Procedures and Plea Agreements) apply to proceedings in which the defendant is an organization. Guidelines and policy statements not referenced in this chapter, directly or indirectly, do not apply when the defendant is an organization; e.g., the policy statements in Chapter Seven (Violations of Probation and Supervised Release) do not apply to organizations.*

3. *The following are definitions of terms used frequently in this chapter:*

   (a) "Offense" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "instant" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).

   (b) "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest. "High-level personnel of a unit of the organization" is defined in the Commentary to §8C2.5 (Culpability Score).

   (c) "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.

   (d) "Agent" means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

   (e) An individual "condoned" an offense if the individual knew of the offense and did not take reasonable steps to prevent or terminate the offense.

   (f) "Similar misconduct" means prior conduct that is similar in nature to the conduct underlying the instant offense, without regard to whether or not such conduct violated

the same statutory provision. For example, prior Medicare fraud would be misconduct similar to an instant offense involving another type of fraud.

(g) "Prior criminal adjudication" means conviction by trial, plea of guilty (including an Alford plea), or plea of nolo contendere.

(h) "Pecuniary gain" is derived from 18 U.S.C. § 3571(d) and means the additional before-tax profit to the defendant resulting from the relevant conduct of the offense. Gain can result from either additional revenue or cost savings. For example, an offense involving odometer tampering can produce additional revenue. In such a case, the pecuniary gain is the additional revenue received because the automobiles appeared to have less mileage, i.e., the difference between the price received or expected for the automobiles with the apparent mileage and the fair market value of the automobiles with the actual mileage. An offense involving defense procurement fraud related to defective product testing can produce pecuniary gain resulting from cost savings. In such a case, the pecuniary gain is the amount saved because the product was not tested in the required manner.

(i) "Pecuniary loss" is derived from 18 U.S.C. § 3571(d) and is equivalent to the term "loss" as used in Chapter Two (Offense Conduct). See Commentary to §2B1.1 (Theft, Property Destruction, and Fraud), and definitions of "tax loss" in Chapter Two, Part T (Offenses Involving Taxation).

(j) An individual was "willfully ignorant of the offense" if the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); November 1, 1997 (see Appendix C, amendment 546); November 1, 2001 (see Appendix C, amendment 617); November 1, 2004 (see Appendix C, amendment 673).

PART B - REMEDYING HARM FROM CRIMINAL CONDUCT, AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

1. REMEDYING HARM FROM CRIMINAL CONDUCT

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

Introductory Commentary

As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense. A restitution order or an order of probation requiring restitution can be used to compensate identifiable victims of the offense. A remedial order or an order of probation requiring community service can be used to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would otherwise not be remedied. An order of notice to victims can be used to notify unidentified victims of the offense.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8B1.1. Restitution - Organizations

(a) In the case of an identifiable victim, the court shall --

(1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

(2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.

(b) *Provided*, that the provisions of subsection (a) do not apply --

(1) when full restitution has been made; or

(2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues

of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.

(d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. See 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. See 18 U.S.C. § 3664(f)(4).

(e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(f) Special Instruction

(1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former §8B1.1 (set forth in Appendix C, amendment 571) in lieu of this guideline in any other case.

Commentary

Background: Section 3553(a)(7) of Title 18, United States Code, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); November 1, 1997 (see Appendix C, amendment 571).

§8B1.2. Remedial Orders - Organizations (Policy Statement)

(a) To the extent not addressed under §8B1.1 (Restitution - Organizations), a remedial order imposed as a condition of probation may require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.

(b) If the magnitude of expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm.

Commentary

Background: The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense, e.g., a product recall for a food and drug violation or a clean-up order for an environmental violation. In some cases in which a remedial order potentially may be appropriate, a governmental regulatory agency, e.g., the Environmental Protection Agency or the Food and Drug Administration, may have authority to order remedial measures. In such cases, a remedial order by the court may not be necessary. If a remedial order is entered, it should be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8B1.3. Community Service - Organizations (Policy Statement)

Community service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense.

Commentary

Background: An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction. However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8B1.4. Order of Notice to Victims - Organizations

Apply §5F1.4 (Order of Notice to Victims).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

§8B2.1. Effective Compliance and Ethics Program

(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (c)(1) of §8D1.4 (Recommended Conditions of Probation - Organizations), an organization shall—

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated

day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps—

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or

detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.

(c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process.

Commentary

Application Notes:

1. *Definitions.—For purposes of this guideline:*

"Compliance and ethics program" means a program designed to prevent and detect criminal conduct.

"Governing authority" means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

"High-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §8A1.2 (Application Instructions - Organizations).

"Standards and procedures" means standards of conduct and internal controls that are reasonably capable of reducing the likelihood of criminal conduct.

2. *Factors to Consider in Meeting Requirements of this Guideline.—*

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.

(B) Applicable Governmental Regulation and Industry Practice.—An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take

to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization. As appropriate, a large organization should encourage small organizations (especially those that have, or seek to have, a business relationship with the large organization) to implement effective compliance and ethics programs.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (I) the governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts; (II) training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization; (III) using available personnel, rather than employing separate staff, to carry out the compliance and ethics program; and (IV) modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.

(D) Recurrence of Similar Misconduct.—Recurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, "similar misconduct" has the meaning given that term in the Commentary to §8A1.2 (Application Instructions - Organizations).

3. *Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance and ethics program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.*

If the specific individual(s) assigned overall responsibility for the compliance and ethics program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no

less than annually, give the governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance and ethics program.

4. *Application of Subsection (b)(3).—*

(A) Consistency with Other Law.—*Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.*

(B) Implementation.—*In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.*

5. Application of Subsection (b)(6).—*Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.*

6. Application of Subsection (c).—*To meet the requirements of subsection (c), an organization shall:*

(A) *Assess periodically the risk that criminal conduct will occur, including assessing the following:*

(i) *The nature and seriousness of such criminal conduct.*

(ii) *The likelihood that certain criminal conduct may occur because of the nature of the organization's business. If, because of the nature of an organization's business, there is a substantial risk that certain types of criminal conduct may occur, the organization shall take reasonable steps to prevent and detect that type of criminal conduct. For example, an organization that, due to the nature of its business, employs sales personnel who have flexibility to set prices shall establish standards and procedures designed to prevent and detect price-fixing. An organization that, due to the nature of its business, employs sales personnel who have flexibility to represent the material characteristics of a product shall establish standards and procedures designed to prevent and detect fraud.*

(iii) *The prior history of the organization. The prior history of an organization may indicate types of criminal conduct that it shall take actions to prevent and detect.*

(B) *Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.*

(C) *Modify, as appropriate, the actions taken pursuant to any requirement set forth in*

subsection (b) to reduce the risk of criminal conduct identified under subdivision (A) of this note as most serious, and most likely, to occur.

Background: This section sets forth the requirements for an effective compliance and ethics program. This section responds to section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, which directed the Commission to review and amend, as appropriate, the guidelines and related policy statements to ensure that the guidelines that apply to organizations in this chapter "are sufficient to deter and punish organizational criminal misconduct."

The requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable. The prior diligence of an organization in seeking to prevent and detect criminal conduct has a direct bearing on the appropriate penalties and probation terms for the organization if it is convicted and sentenced for a criminal offense.

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

PART C - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATIONS

§8C1.1. Determining the Fine - Criminal Purpose Organizations

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets. When this section applies, Subpart 2 (Determining the Fine - Other Organizations) and §8C3.4 (Fines Paid by Owners of Closely Held Organizations) do not apply.

Commentary

Application Note:

1. *"Net assets," as used in this section, means the assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors.*

Background: This guideline addresses the case in which the court, based upon an examination of the nature and circumstances of the offense and the history and characteristics of the organization, determines that the organization was operated primarily for a criminal purpose (e.g., a front for a scheme that was designed to commit fraud; an organization established to participate in the illegal manufacture, importation, or distribution of a controlled substance) or operated primarily by criminal means (e.g., a hazardous waste disposal business that had no legitimate means of disposing of hazardous waste). In such a case, the fine shall be set at an amount sufficient to remove all of the organization's net assets. If the extent of the assets of the organization is unknown, the maximum fine authorized by statute should be imposed, absent innocent bona fide creditors.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

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2. DETERMINING THE FINE - OTHER ORGANIZATIONS

§8C2.1. Applicability of Fine Guidelines

The provisions of §§8C2.2 through 8C2.9 apply to each count for which the applicable guideline offense level is determined under:

(a) §§2B1.1, 2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.6;
§§2D1.7, 2D3.1, 2D3.2;
§§2E3.1, 2E4.1, 2E5.1, 2E5.3;
§2G3.1;
§§2K1.1, 2K2.1;
§2L1.1;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T1.9, 2T2.1, 2T2.2, 2T3.1; or

(b) §§2E1.1, 2X1.1, 2X2.1, 2X3.1, 2X4.1, with respect to cases in which the offense level for the underlying offense is determined under one of the guideline sections listed in subsection (a) above.

Commentary

Application Notes:

1. *If the Chapter Two offense guideline for a count is listed in subsection (a) or (b) above, and the applicable guideline results in the determination of the offense level by use of one of the listed guidelines, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, §§8C2.2 through 8C2.9 apply to an offense under §2K2.1 (an offense guideline listed in subsection (a)), unless the cross reference in that guideline requires the offense level to be determined under an offense guideline section not listed in subsection (a).*

2. *If the Chapter Two offense guideline for a count is not listed in subsection (a) or (b) above, but the applicable guideline results in the determination of the offense level by use of a listed guideline, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, where the conduct set forth in a count of conviction ordinarily referenced to §2N2.1 (an offense guideline not listed in subsection (a)) establishes §2B1.1 (Theft, Property Destruction, and Fraud) as the applicable offense guideline (an offense guideline listed in subsection (a)), §§8C2.2 through 8C2.9 would apply because the actual offense level is determined under §2B1.1 (Theft, Property Destruction, and Fraud).*

Background: The fine guidelines of this subpart apply only to offenses covered by the guideline sections set forth in subsection (a) above. For example, the provisions of §§8C2.2 through 8C2.9 do not apply to counts for which the applicable guideline offense level is determined under Chapter Two, Part Q (Offenses Involving the Environment). For such cases, §8C2.10 (Determining the Fine for Other Counts) is applicable.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 1992 (see Appendix C, amendment 453); November 1, 1993 (see Appendix C, amendment 496); November 1, 2001 (see Appendix C, amendments 617, 619, and 634); November 1, 2005 (see Appendix C, amendment 679).

§8C2.2. Preliminary Determination of Inability to Pay Fine

(a) Where it is readily ascertainable that the organization cannot and is not likely to become able (even on an installment schedule) to pay restitution required under §8B1.1 (Restitution - Organizations), a determination of the guideline fine range is unnecessary because, pursuant to §8C3.3(a), no fine would be imposed.

(b) Where it is readily ascertainable through a preliminary determination of the minimum of the guideline fine range (see §§8C2.3 through 8C2.7) that the organization cannot and is not likely to become able (even on an installment schedule) to pay such minimum guideline fine, a further determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay).

Commentary

Application Notes:

1. *In a case of a determination under subsection (a), a statement that "the guideline fine range was not determined because it is readily ascertainable that the defendant cannot and is not likely to become able to pay restitution" is recommended.*

2. *In a case of a determination under subsection (b), a statement that "no precise determination of the guideline fine range is required because it is readily ascertainable that the defendant cannot and is not likely to become able to pay the minimum of the guideline fine range" is recommended.*

Background: Many organizational defendants lack the ability to pay restitution. In addition, many organizational defendants who may be able to pay restitution lack the ability to pay the minimum fine called for by §8C2.7(a). In such cases, a complete determination of the guideline fine range may be a needless exercise. This section provides for an abbreviated determination of the guideline fine range that can be applied where it is readily ascertainable that the fine within the guideline fine range determined under §8C2.7 (Guideline Fine Range - Organizations) would be reduced under §8C3.3 (Reduction of Fine Based on Inability to Pay).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.3. Offense Level

(a) For each count covered by §8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline.

(b) Where there is more than one such count, apply Chapter Three, Part D (Multiple Counts) to determine the combined offense level.

Commentary

Application Notes:

1. *In determining the offense level under this section, "defendant," as used in Chapter Two, includes any agent of the organization for whose conduct the organization is criminally responsible.*

2. *In determining the offense level under this section, apply the provisions of §§1B1.2 through 1B1.8. Do not apply the adjustments in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), C (Obstruction), and E (Acceptance of Responsibility).*

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.4. Base Fine

(a) The base fine is the greatest of:

(1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or

(2) the pecuniary gain to the organization from the offense; or

(3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

(b) *Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate.

(c) *Provided, further*, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine.

(d) Offense Level Fine Table

Offense Level	Amount
6 or less	$5,000
7	$7,500
8	$10,000
9	$15,000
10	$20,000
11	$30,000
12	$40,000
13	$60,000
14	$85,000
15	$125,000
16	$175,000

17	$250,000
18	$350,000
19	$500,000
20	$650,000
21	$910,000
22	$1,200,000
23	$1,600,000
24	$2,100,000
25	$2,800,000
26	$3,700,000
27	$4,800,000
28	$6,300,000
29	$8,100,000
30	$10,500,000
31	$13,500,000
32	$17,500,000
33	$22,000,000
34	$28,500,000
35	$36,000,000
36	$45,500,000
37	$57,500,000
38 or more	$72,500,000.

Commentary

Application Notes:

1. *"Pecuniary gain," "pecuniary loss," and "offense" are defined in the Commentary to §8A1.2 (Application Instructions - Organizations). Note that subsections (a)(2) and (a)(3) contain certain limitations as to the use of pecuniary gain and pecuniary loss in determining the base fine. Under subsection (a)(2), the pecuniary gain used to determine the base fine is the pecuniary gain to the organization from the offense. Under subsection (a)(3), the pecuniary loss used to determine the base fine is the pecuniary loss from the offense caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly.*

2. *Under 18 U.S.C. § 3571(d), the court is not required to calculate pecuniary loss or pecuniary gain to the extent that determination of loss or gain would unduly complicate or prolong the sentencing process. Nevertheless, the court may need to approximate loss in order to calculate offense levels under Chapter Two. See Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). If loss is approximated for purposes of determining the applicable offense level, the court should use that approximation as the starting point for calculating pecuniary loss under this section.*

3. *In a case of an attempted offense or a conspiracy to commit an offense, pecuniary loss and pecuniary gain are to be determined in accordance with the principles stated in §2X1.1 (Attempt, Solicitation, or Conspiracy).*

4. *In a case involving multiple participants (i.e., multiple organizations, or the organization and individual(s) unassociated with the organization), the applicable offense level is to be determined without regard to apportionment of the gain from or loss caused by the offense. See §1B1.3 (Relevant Conduct). However, if the base fine is determined under subsections (a)(2) or (a)(3), the court may, as appropriate, apportion gain or loss considering the defendant's relative culpability and other pertinent factors. Note also that under §2R1.1(d)(1), the volume of commerce, which is used in determining a proxy for loss under §8C2.4(a)(3), is limited to the volume of commerce attributable to the defendant.*

5. *Special instructions regarding the determination of the base fine are contained in §§2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery); 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); 2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations); and 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).*

Background: Under this section, the base fine is determined in one of three ways: (1) by the amount, based on the offense level, from the table in subsection (d); (2) by the pecuniary gain to the organization from the offense; and (3) by the pecuniary loss caused by the organization, to the extent that such loss was caused intentionally, knowingly, or recklessly. In certain cases, special instructions for determining the loss or offense level amount apply. As a general rule, the base fine measures the seriousness of the offense. The determinants of the base fine are selected so that, in conjunction with the multipliers derived from the culpability score in §8C2.5 (Culpability Score), they will result in guideline fine ranges appropriate to deter organizational criminal conduct and to provide incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct. In order to deter organizations from seeking to obtain financial reward through criminal conduct, this section provides that, when greatest, pecuniary gain to the organization is used to determine the base fine. In order to ensure that organizations will seek to prevent losses intentionally, knowingly, or recklessly caused by their agents, this section provides that, when greatest, pecuniary loss is used to determine the base fine in such circumstances. Chapter Two provides special instructions for fines that include specific rules for determining the base fine in connection with certain types of offenses in which the calculation of loss or gain is difficult, e.g., price-fixing. For these offenses, the special instructions tailor the base fine to circumstances that occur in connection with such offenses and that generally relate to the magnitude of loss or gain resulting from such offenses.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 1993 (see Appendix C, amendment 496); November 1, 1995 (see Appendix C, amendment 534); November 1, 2001 (see Appendix C, amendment 634); November 1, 2004 (see Appendix C, amendments 666 and 673).

§8C2.5. Culpability Score

(a) Start with **5** points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Criminal Activity

If more than one applies, use the greatest:

(1) If --

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **5** points; or

(2) If --

(A) the organization had 1,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 1,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel

was pervasive throughout such unit,

add **4** points; or

(3) If --

(A) the organization had 200 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the offense was committed had 200 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or

(ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add **3** points; or

(4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **2** points; or

(5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **1** point.

(c) Prior History

If more than one applies, use the greater:

(1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **1** point; or

(2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **2** points.

(d) Violation of an Order

If more than one applies, use the greater:

(1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add **2** points; or

(2) If the commission of the instant offense violated a condition of probation, add **1** point.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add **3** points.

(f) Effective Compliance and Ethics Program

(1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract **3** points.

(2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

(3) (A) Except as provided in subdivision (B), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

(B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

(i) within high-level personnel of a small organization; or

(ii) within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the

offense.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or

(2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or

(3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point.

Commentary

Application Notes:

1. *Definitions.—For purposes of this guideline, "condoned", "prior criminal adjudication", "similar misconduct", "substantial authority personnel", and "willfully ignorant of the offense" have the meaning given those terms in Application Note 3 of the Commentary to §8A1.2 (Application Instructions - Organizations).*

   "Small Organization", for purposes of subsection (f)(3), means an organization that, at the time of the instant offense, had fewer than 200 employees.

2. *For purposes of subsection (b), "unit of the organization" means any reasonably distinct operational component of the organization. For example, a large organization may have several large units such as divisions or subsidiaries, as well as many smaller units such as specialized manufacturing, marketing, or accounting operations within these larger units. For purposes of this definition, all of these types of units are encompassed within the term "unit of the organization."*

3. *"High-level personnel of the organization" is defined in the Commentary to §8A1.2 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, three points would be added under subsection (b)(3); if that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the organization in its entirety, four points (rather than three) would be added under subsection (b)(2).*

4. *Pervasiveness under subsection (b) will be case specific and depend on the number, and degree*

of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. For example, if an offense were committed in an organization with 1,000 employees but the tolerance of the offense was pervasive only within a unit of the organization with 200 employees (and no high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense), three points would be added under subsection (b)(3). If, in the same organization, tolerance of the offense was pervasive throughout the organization as a whole, or an individual within high-level personnel of the organization participated in the offense, four points (rather than three) would be added under subsection (b)(2).

5. *A "separately managed line of business," as used in subsections (c) and (d), is a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business. Under subsection (c), in determining the prior history of an organization with separately managed lines of business, only the prior conduct or criminal record of the separately managed line of business involved in the instant offense is to be used. Under subsection (d), in the context of an organization with separately managed lines of business, in making the determination whether a violation of a condition of probation involved engaging in similar misconduct, only the prior misconduct of the separately managed line of business involved in the instant offense is to be considered.*

6. *Under subsection (c), in determining the prior history of an organization or separately managed line of business, the conduct of the underlying economic entity shall be considered without regard to its legal structure or ownership. For example, if two companies merged and became separate divisions and separately managed lines of business within the merged company, each division would retain the prior history of its predecessor company. If a company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company. In contrast, if one company purchased the physical assets but not the ongoing business of another company, the prior history of the company selling the physical assets would not be transferred to the company purchasing the assets. However, if an organization is acquired by another organization in response to solicitations by appropriate federal government officials, the prior history of the acquired organization shall not be attributed to the acquiring organization.*

7. *Under subsections (c)(1)(B) and (c)(2)(B), the civil or administrative adjudication(s) must have occurred within the specified period (ten or five years) of the instant offense.*

8. *Adjust the culpability score for the factors listed in subsection (e) whether or not the offense guideline incorporates that factor, or that factor is inherent in the offense.*

9. *Subsection (e) applies where the obstruction is committed on behalf of the organization; it does not apply where an individual or individuals have attempted to conceal their misconduct from the organization. The Commentary to §3C1.1 (Obstructing or Impeding the Administration of Justice) provides guidance regarding the types of conduct that constitute obstruction.*

10. *Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2)*

if the organization reasonably concluded, based on the information then available, that no offense had been committed.

11. *"Appropriate governmental authorities," as used in subsections (f) and (g)(1), means the federal or state law enforcement, regulatory, or program officials having jurisdiction over such matter. To qualify for a reduction under subsection (g)(1), the report to appropriate governmental authorities must be made under the direction of the organization.*

12. *To qualify for a reduction under subsection (g)(1) or (g)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization's efforts to cooperate fully, the organization may still be given credit for full cooperation.*

13. *Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility under subsection (g), unless outweighed by conduct of the organization that is inconsistent with such acceptance of responsibility. This adjustment is not intended to apply to an organization that puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude an organization from consideration for such a reduction. In rare situations, an organization may clearly demonstrate an acceptance of responsibility for its criminal conduct even though it exercises its constitutional right to a trial. This may occur, for example, where an organization goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to its conduct). In each such instance, however, a determination that an organization has accepted responsibility will be based primarily upon pretrial statements and conduct.*

14. *In making a determination with respect to subsection (g), the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.*

Background: The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually

increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673); November 1, 2006 (see Appendix C, amendment 695).

§8C2.6. Minimum and Maximum Multipliers

Using the culpability score from §8C2.5 (Culpability Score) and applying any applicable special instruction for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table below.

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20.

Commentary

Application Note:

1. *A special instruction for fines in §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) sets a floor for minimum and maximum multipliers in cases covered by that guideline.*

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.7. Guideline Fine Range - Organizations

(a) The minimum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable minimum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

(b) The maximum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable maximum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.8. Determining the Fine Within the Range (Policy Statement)

(a) In determining the amount of the fine within the applicable guideline range, the court should consider:

(1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization;

(2) the organization's role in the offense;

(3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct;

(4) any nonpecuniary loss caused or threatened by the offense;

(5) whether the offense involved a vulnerable victim;

(6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;

(7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c);

(8) any culpability score under §8C2.5 (Culpability Score) higher than 10 or lower than 0;

(9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score);

(10) any factor listed in 18 U.S.C. § 3572(a); and

(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program).

(b) In addition, the court may consider the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score.

Commentary

Application Notes:

1. *Subsection (a)(2) provides that the court, in setting the fine within the guideline fine range, should consider the organization's role in the offense. This consideration is particularly appropriate if the guideline fine range does not take the organization's role in the offense into account. For example, the guideline fine range in an antitrust case does not take into consideration whether the organization was an organizer or leader of the conspiracy. A higher fine within the guideline fine range ordinarily will be appropriate for an organization that takes a leading role in such an offense.*

2. *Subsection (a)(3) provides that the court, in setting the fine within the guideline fine range, should consider any collateral consequences of conviction, including civil obligations arising from the organization's conduct. As a general rule, collateral consequences that merely make victims whole provide no basis for reducing the fine within the guideline range. If criminal and civil sanctions are unlikely to make victims whole, this may provide a basis for a higher fine within the guideline fine range. If punitive collateral sanctions have been or will be imposed on the organization, this may provide a basis for a lower fine within the guideline fine range.*

3. *Subsection (a)(4) provides that the court, in setting the fine within the guideline fine range, should consider any nonpecuniary loss caused or threatened by the offense. To the extent that nonpecuniary loss caused or threatened (e.g., loss of or threat to human life; psychological injury; threat to national security) by the offense is not adequately considered in setting the guideline fine range, this factor provides a basis for a higher fine within the range. This factor is more likely to be applicable where the guideline fine range is determined by pecuniary loss or gain, rather than by offense level, because the Chapter Two offense levels frequently take actual or threatened nonpecuniary loss into account.*

4. *Subsection (a)(6) provides that the court, in setting the fine within the guideline fine range, should consider any prior criminal record of an individual within high-level personnel of the organization or within high-level personnel of a unit of the organization. Since an individual within high-level personnel either exercises substantial control over the organization or a unit of the organization or has a substantial role in the making of policy within the organization or a unit of the organization, any prior criminal misconduct of such an individual may be relevant to the determination of the appropriate fine for the organization.*

5. *Subsection (a)(7) provides that the court, in setting the fine within the guideline fine range, should consider any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c). The civil and criminal misconduct counted under §8C2.5(c) increases the guideline fine range. Civil or criminal misconduct other than that counted under §8C2.5(c) may provide a basis for a higher fine within the range. In a case involving a pattern of illegality, an upward departure may be warranted.*

6. *Subsection (a)(8) provides that the court, in setting the fine within the guideline fine range, should consider any culpability score higher than ten or lower than zero. As the culpability score increases above ten, this may provide a basis for a higher fine within the range. Similarly, as the culpability score decreases below zero, this may provide a basis for a lower fine within the range.*

7. *Under subsection (b), the court, in determining the fine within the range, may consider any factor that it considered in determining the range. This allows for courts to differentiate between cases that have the same offense level but differ in seriousness (e.g., two fraud cases at offense level 12, one resulting in a loss of $21,000, the other $40,000). Similarly, this allows*

for courts to differentiate between two cases that have the same aggravating factors, but in which those factors vary in their intensity (e.g., two cases with upward adjustments to the culpability score under §8C2.5(c)(2) (prior criminal adjudications within 5 years of the commencement of the instant offense, one involving a single conviction, the other involving two or more convictions).

Background: Subsection (a) includes factors that the court is required to consider under 18 U.S.C. §§ 3553(a) and 3572(a) as well as additional factors that the Commission has determined may be relevant in a particular case. A number of factors required for consideration under 18 U.S.C. § 3572(a) (e.g., pecuniary loss, the size of the organization) are used under the fine guidelines in this subpart to determine the fine range, and therefore are not specifically set out again in subsection (a) of this guideline. In unusual cases, factors listed in this section may provide a basis for departure.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8C2.9. Disgorgement

The court shall add to the fine determined under §8C2.8 (Determining the Fine Within the Range) any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures.

Commentary

Application Note:

1. *This section is designed to ensure that the amount of any gain that has not and will not be taken from the organization for remedial purposes will be added to the fine. This section typically will apply in cases in which the organization has received gain from an offense but restitution or remedial efforts will not be required because the offense did not result in harm to identifiable victims, e.g., money laundering, obscenity, and regulatory reporting offenses. Money spent or to be spent to remedy the adverse effects of the offense, e.g., the cost to retrofit defective products, should be considered as disgorged gain. If the cost of remedial efforts made or to be made by the organization equals or exceeds the gain from the offense, this section will not apply.*

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.10. Determining the Fine for Other Counts

For any count or counts not covered under §8C2.1 (Applicability of Fine Guidelines), the court should determine an appropriate fine by applying the provisions of 18 U.S.C. §§ 3553 and 3572. The court should determine the appropriate fine amount, if any, to be imposed in addition to any fine determined under §8C2.8 (Determining the Fine Within the Range) and §8C2.9 (Disgorgement).

Commentary

Background: The Commission has not promulgated guidelines governing the setting of fines for counts not covered by §8C2.1 (Applicability of Fine Guidelines). For such counts, the court should determine the appropriate fine based on the general statutory provisions governing sentencing. In cases that have a count or counts not covered by the guidelines in addition to a count or counts covered by the guidelines, the court shall apply the fine guidelines for the count(s) covered by the guidelines, and add any additional amount to the fine, as appropriate, for the count(s) not covered by the guidelines.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

* * * * *

3. IMPLEMENTING THE SENTENCE OF A FINE

§8C3.1. Imposing a Fine

(a) Except to the extent restricted by the maximum fine authorized by statute or any minimum fine required by statute, the fine or fine range shall be that determined under §8C1.1 (Determining the Fine - Criminal Purpose Organizations); §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement); or §8C2.10 (Determining the Fine for Other Counts), as appropriate.

(b) Where the minimum guideline fine is greater than the maximum fine authorized by statute, the maximum fine authorized by statute shall be the guideline fine.

(c) Where the maximum guideline fine is less than a minimum fine required by statute, the minimum fine required by statute shall be the guideline fine.

Commentary

Background: This section sets forth the interaction of the fines or fine ranges determined under this chapter with the maximum fine authorized by statute and any minimum fine required by statute for the count or counts of conviction. The general statutory provisions governing a sentence of a fine are set forth in 18 U.S.C. § 3571.

When the organization is convicted of multiple counts, the maximum fine authorized by statute may increase. For example, in the case of an organization convicted of three felony counts related to a $200,000 fraud, the maximum fine authorized by statute will be $500,000 on each count, for an aggregate maximum authorized fine of $1,500,000.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C3.2. Payment of the Fine - Organizations

(a) If the defendant operated primarily for a criminal purpose or primarily by criminal means, immediate payment of the fine shall be required.

(b) In any other case, immediate payment of the fine shall be required unless the court finds that the organization is financially unable to make immediate payment or that such payment would pose an undue burden on the organization. If the court permits other than immediate payment, it shall require full payment at the earliest possible date, either by requiring payment on a date certain or by establishing an installment schedule.

Commentary

Application Note:

1. *When the court permits other than immediate payment, the period provided for payment shall in no event exceed five years. 18 U.S.C. § 3572(d).*

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C3.3. Reduction of Fine Based on Inability to Pay

(a) The court shall reduce the fine below that otherwise required by §8C1.1 (Determining the Fine - Criminal Purpose Organizations), or §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement), to the extent that imposition of such fine would impair its ability to make restitution to victims.

(b) The court may impose a fine below that otherwise required by §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement) if the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required by §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement).

Provided, that the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

Commentary

Application Note:

1. *For purposes of this section, an organization is not able to pay the minimum fine if, even with an installment schedule under §8C3.2 (Payment of the Fine - Organizations), the payment of that fine would substantially jeopardize the continued existence of the organization.*

Background: Subsection (a) carries out the requirement in 18 U.S.C. § 3572(b) that the court impose

a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the organization to make restitution for the offense; however, this section does not authorize a criminal purpose organization to remain in business in order to pay restitution.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C3.4. Fines Paid by Owners of Closely Held Organizations

The court may offset the fine imposed upon a closely held organization when one or more individuals, each of whom owns at least a 5 percent interest in the organization, has been fined in a federal criminal proceeding for the same offense conduct for which the organization is being sentenced. The amount of such offset shall not exceed the amount resulting from multiplying the total fines imposed on those individuals by those individuals' total percentage interest in the organization.

Commentary

Application Notes:

1. *For purposes of this section, an organization is closely held, regardless of its size, when relatively few individuals own it. In order for an organization to be closely held, ownership and management need not completely overlap.*

2. *This section does not apply to a fine imposed upon an individual that arises out of offense conduct different from that for which the organization is being sentenced.*

Background: For practical purposes, most closely held organizations are the alter egos of their owner-managers. In the case of criminal conduct by a closely held corporation, the organization and the culpable individual(s) both may be convicted. As a general rule in such cases, appropriate punishment may be achieved by offsetting the fine imposed upon the organization by an amount that reflects the percentage ownership interest of the sentenced individuals and the magnitude of the fines imposed upon those individuals. For example, an organization is owned by five individuals, each of whom has a twenty percent interest; three of the individuals are convicted; and the combined fines imposed on those three equals $100,000. In this example, the fine imposed upon the organization may be offset by up to 60 percent of their combined fine amounts, i.e., by $60,000.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

* * * * *

4. DEPARTURES FROM THE GUIDELINE FINE RANGE

Introductory Commentary

The statutory provisions governing departures are set forth in 18 U.S.C. § 3553(b). Departure may be warranted if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. In deciding whether departure is warranted, the court should consider the extent to which that factor is adequately taken into consideration by the guidelines and the relative importance or substantiality of that factor in the particular case.

To the extent that any policy statement from Chapter Five, Part K (Departures) is relevant to the organization, a departure from the applicable guideline fine range may be warranted. Some factors listed in Chapter Five, Part K that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Five, Part K may be applicable in particular cases. While this subpart lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.1. Substantial Assistance to Authorities - Organizations (Policy Statement)

(a) Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another organization that has committed an offense, or in the investigation or prosecution of an individual not directly affiliated with the defendant who has committed an offense, the court may depart from the guidelines.

(b) The appropriate reduction shall be determined by the court for reasons stated on the record that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the organization's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the nature and extent of the organization's assistance; and

(3) the timeliness of the organization's assistance.

Commentary

Application Note:

1. *Departure under this section is intended for cases in which substantial assistance is provided in the investigation or prosecution of crimes committed by individuals not directly affiliated with the organization or by other organizations. It is not intended for assistance in the investigation or prosecution of the agents of the organization responsible for the offense for which the organization is being sentenced.*

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.2. Risk of Death or Bodily Injury (Policy Statement)

If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.3. Threat to National Security (Policy Statement)

If the offense constituted a threat to national security, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.4. Threat to the Environment (Policy Statement)

If the offense presented a threat to the environment, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.5. Threat to a Market (Policy Statement)

If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted. This section is applicable to both private markets (e.g., a financial market, a commodities market, or a market for consumer goods) and public markets (e.g., government contracting).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.6. Official Corruption (Policy Statement)

If the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.7. Public Entity (Policy Statement)

If the organization is a public entity, a downward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.8. Members or Beneficiaries of the Organization as Victims (Policy Statement)

If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of an organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.9. Remedial Costs that Greatly Exceed Gain (Policy Statement)

If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within high-level personnel was involved in the offense, a departure would not be appropriate under this section. The lower the level and the more limited the extent of substantial authority personnel involvement in the offense, and the greater the degree to which remedial costs exceeded or will exceed gain, the less will be the need for a substantial fine to achieve adequate punishment and deterrence.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)

If the organization's culpability score is reduced under §8C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8C4.11. Exceptional Organizational Culpability (Policy Statement)

If the organization's culpability score is greater than 10, an upward departure may be appropriate.

If no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under §8C2.4(a)(1), §8C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct), a downward departure may be warranted. In a case meeting these criteria, the court may find that the organization had exceptionally low culpability and therefore a fine based on loss, offense level, or a special Chapter Two instruction results in a guideline fine range higher than necessary to achieve the purposes of sentencing. Nevertheless, such fine should not be lower than if determined under §8C2.4(a)(2).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

PART D - ORGANIZATIONAL PROBATION

Introductory Commentary

Section 8D1.1 sets forth the circumstances under which a sentence to a term of probation is required. Sections 8D1.2 through 8D1.4, and 8F1.1, address the length of the probation term, conditions of probation, and violations of probation conditions.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8D1.1. Imposition of Probation - Organizations

(a) The court shall order a term of probation:

(1) if such sentence is necessary to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3);

(2) if the organization is sentenced to pay a monetary penalty (e.g., restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments;

(3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;

(4) if the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(5) if an individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(6) if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct;

(7) if the sentence imposed upon the organization does not include a fine; or

(8) if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Commentary

Background: Under 18 U.S.C. § 3561(a), an organization may be sentenced to a term of probation. Under 18 U.S.C. § 3551(c), imposition of a term of probation is required if the sentence imposed upon the organization does not include a fine.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8D1.2. Term of Probation - Organizations

(a) When a sentence of probation is imposed --

(1) In the case of a felony, the term of probation shall be at least one year but not more than five years.

(2) In any other case, the term of probation shall be not more than five years.

Commentary

Application Note:

1. Within the limits set by the guidelines, the term of probation should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation. The terms of probation set forth in this section are those provided in 18 U.S.C. § 3561(b).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8D1.3. Conditions of Probation - Organizations

(a) Pursuant to 18 U.S.C. § 3563(a)(1), any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation.

(b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: (1) restitution, (2) notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (3) an order requiring the organization to reside, or refrain from residing, in a specified place or area, unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).
Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of

1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).

(c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 1997 (see Appendix C, amendment 569).

§8D1.4. Recommended Conditions of Probation - Organizations (Policy Statement)

(a) The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.

(b) If probation is imposed under §8D1.1(a)(2), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment:

(1) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received.

(2) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

(3) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement

of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(4) The organization shall be required to make periodic payments, as

specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.

(c) If probation is ordered under §8D1.1(a)(3), (4), (5), or (6), the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall make periodic reports to the court or probation officer, at intervals and in a form specified by the court, regarding the organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(4) In order to monitor whether the organization is following the program referred to in subdivision (1), the organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.

Commentary

Application Note:

1. *In determining the conditions to be imposed when probation is ordered under §8D1.1(a)(3) through (6), the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense. To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program. The court should approve any program that appears reasonably calculated to prevent and detect criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics Program), and any applicable statutory and regulatory requirements.*

Periodic reports submitted in accordance with subsection (c)(3) should be provided to any governmental regulatory body that oversees conduct of the organization relating to the instant offense.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422). Amended effective November 1, 2004 (see Appendix C, amendment 673).

§8D1.5. [Deleted]

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); was moved to §8F1.1 effective November 1, 2004 (see Appendix C, amendment 673).

PART E - SPECIAL ASSESSMENTS, FORFEITURES, AND COSTS

§8E1.1. Special Assessments - Organizations

A special assessment must be imposed on an organization in the amount prescribed by statute.

Commentary

Application Notes:

1. *This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. See §5E1.3 for special assessments applicable to individuals.*

2. *The following special assessments are provided by statute (see 18 U.S.C. § 3013):*

   For Offenses Committed By Organizations On Or After April 24, 1996:

   (A) $400, if convicted of a felony;
   (B) $125, if convicted of a Class A misdemeanor;
   (C) $50, if convicted of a Class B misdemeanor; or
   (D) $25, if convicted of a Class C misdemeanor or an infraction.

   For Offenses Committed By Organizations On Or After November 18, 1988 But Prior To April 24, 1996:

   (E) $200, if convicted of a felony;
   (F) $125, if convicted of a Class A misdemeanor;
   (G) $50, if convicted of a Class B misdemeanor; or
   (H) $25, if convicted of a Class C misdemeanor or an infraction.

   For Offenses Committed By Organizations Prior To November 18, 1988:

   (I) $200, if convicted of a felony;
   (J) $100, if convicted of a misdemeanor.

3. *A special assessment is required by statute for each count of conviction.*

Background: Section 3013 of Title 18, United States Code, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422); November 1, 1997 (see Appendix C, amendment 573).

§8E1.2. Forfeiture - Organizations

Apply §5E1.4 (Forfeiture).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8E1.3. Assessment of Costs - Organizations

As provided in 28 U.S.C. § 1918, the court may order the organization to pay the costs of prosecution. In addition, specific statutory provisions mandate assessment of costs.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

PART F - VIOLATIONS OF PROBATION - ORGANIZATIONS

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

§8F1.1. Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Notes:

1. *Appointment of Master or Trustee.—In the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.*

2. *Conditions of Probation.—Mandatory and recommended conditions of probation are specified in §§8D1.3 (Conditions of Probation - Organizations) and 8D1.4 (Recommended Conditions of Probation - Organizations).*

Historical Note: Effective November 1, 2004 (see Appendix C, amendment 673).

U.S. v. Stein
S.D.N.Y.,2006.

Editor's Note: Additions are indicated by Text anddeletions by ~~Text~~.

United States District Court,S.D. New York.
UNITED STATES of America,
v.
Jeffrey STEIN, et al., Defendants.
No. S1 05 Crim. 0888(LAK).

June 26, 2006.

Background: Government indicted employees of accounting firm, alleging accounting fraud. Employees moved for dismissal of indictment and other relief, claiming government applied pressure on firm to cut off reimbursement of attorney fees after employees were indicted.

Holdings: The District Court, Kaplan, J., held that:

(1) statute allowed for indemnification of employees by firm;

(2) Justice Department memorandum providing that payment of employee's attorney fees would be considered lack of cooperation on part of employer, when consideration was being given to indicting employer, was violation of substantive due process rights of employees;

(3) United States Attorney improperly pressured firm into terminating attorney payments;

(4) employees' right to counsel was violated;

(5) government had sovereign immunity from monetary claims; and

(6) court had ancillary jurisdiction over claim that firm should resume making payments to employees.

Ordered accordingly.

See, also, 429 F.Supp.2d 648.

West Headnotes

[1] Accountants 11A ⚿6.1

11A Accountants
11Ak6 Contracts, Employment, and Compensation
11Ak6.1 k. In General. Most Cited Cases

Partnership 289 ⚿366

289 Partnership
289VIII Limited Partnership
289k366 k. Relation Between Partners in General. Most Cited Cases
Statute under which limited liability accounting partnership was allowed to indemnify employees permitted partnership to pay legal expenses of employees being investigated for accounting fraud, and allowed for continuation of payments following indictments. 6 West's Del.C. § 15-110.

[2] Constitutional Law 92 ⚿4500

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)1 In General
92k4500 k. In General. Most Cited Cases
(Formerly 92k257)

Criminal Law 110 ⚿633(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General

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110k633 Regulation in General
110k633(1) k. In General. Most Cited Cases
Employees of accounting firm, indicted for criminal fraud, were entitled under Due Process Clause to fundamental fairness throughout criminal process. U.S.C.A. Const.Amend. 5.

[3] Constitutional Law 92 ⚿4593

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4593 k. In General. Most Cited Cases
(Formerly 92k257.5)
Criminal defendant has substantive due process right to obtain and use, in order to prepare defense, resources lawfully available to him or her, free of knowing or reckless government interference. U.S.C.A. Const.Amend. 5.

[4] Constitutional Law 92 ⚿4800

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)10 Counsel
92k4800 k. In General. Most Cited Cases
(Formerly 92k268.1(1))

Criminal Law 110 ⚿641.12(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.12 Deprivation or Allowance of Counsel
110k641.12(3) k. Assistance and Compensation of Counsel. Most Cited Cases
Substantive due process rights of accounting firm employees were affected, triggering strict scrutiny review of Justice Department's issuance of memorandum stating that advancing attorney fees payments to potentially culpable employees would be considered as negative factor in determining whether accounting firm had cooperated sufficiently to avoid indictment for accounting fraud. U.S.C.A. Const.Amend. 5.

[5] Constitutional Law 92 ⚿4800

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)10 Counsel
92k4800 k. In General. Most Cited Cases
(Formerly 92k268.1(1))

Criminal Law 110 ⚿641.12(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.12 Deprivation or Allowance of Counsel
110k641.12(3) k. Assistance and Compensation of Counsel. Most Cited Cases
Government memo, providing that advancement of funds to cover legal fees of accounting firm employees, suspected of committing accounting fraud, would be considered as negative factor in assessing whether employer was sufficiently cooperating with government investigation to forestall indictment, violated due process clause, when analyzed under strict scrutiny test; while provision advanced compelling government interest in being able to investigate instances of fraud, it was not narrowly tailored to achieve objective, as payments to be considered were not limited to those actually used to obstruct an investigation, and relationship between payments and level of employer cooperation was problematic. U.S.C.A. Const.Amend. 5.

[6] Constitutional Law 92 ⚿4800

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law

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92XXVII(H)10 Counsel
92k4800 k. In General. Most Cited Cases
(Formerly 92k268.1(1))

Criminal Law 110 ⚿641.12(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.12 Deprivation or Allowance of Counsel
110k641.12(3) k. Assistance and Compensation of Counsel. Most Cited Cases
United States Attorneys office violated due process rights of accounting firm employees, suspected of committing fraud, when they emphasized to firm existence of memorandum providing that payment of attorney fees of culpable employees would be considered as negative factor in determining whether employer's degree of cooperation was sufficient to forestall indictment, creating impression that indictment of firm would follow if payments were not cut off. U.S.C.A. Const.Amend. 5.

[7] Criminal Law 110 ⚿641.3(4)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.3 Stage of Proceedings as Affecting Right
110k641.3(4) k. Particular Proceedings or Occasions. Most Cited Cases
Sixth Amendment right to counsel attached to employees of accounting firm suspected of committing fraud, even though right did not ordinarily arise until filing of charges, and complained of conduct, publication of memorandum making payment of employee legal fees a factor tending to show noncooperation of firm seeking to avoid fraud indictment, and actions of assistant attorney generals constituting threat to indict if payments to employee suspects was not discontinued, occurred before indictment of employees; complained of conduct was sufficiently connected to indictments to allow for application of Sixth Amendment. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚿641.12(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.12 Deprivation or Allowance of Counsel
110k641.12(3) k. Assistance and Compensation of Counsel. Most Cited Cases
Employees of accounting firm could claim that government denied their Sixth Amendment right of counsel by pressuring employer to discontinue reimbursement of legal fees incurred in defending criminal claims, despite claim that money was being used to subsidize expensive legal defense that could better be used for other purposes; money was contractually obligated to be paid to employee, for reimbursement of legal fees, without limitation based on choice of counsel. U.S.C.A. Const.Amend. 6.

[9] Criminal Law 110 ⚿641.12(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.12 Deprivation or Allowance of Counsel
110k641.12(3) k. Assistance and Compensation of Counsel. Most Cited Cases
Government violated right to counsel of accountants, suspected of committing accounting fraud, by issuing memorandum providing that employers' advancement of funds to culpable employees would be negative factor in determining whether there was sufficient cooperation to forestall indictment, and by threatening indictment if funding was not discontinued. U.S.C.A. Const.Amend. 6.

[10] Constitutional Law 92 ⚿4800

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92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)10 Counsel
92k4800 k. In General. Most Cited Cases
(Formerly 92k268.1(1))

Criminal Law 110 ⚖641.12(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.12 Deprivation or Allowance of Counsel
110k641.12(3) k. Assistance and Compensation of Counsel. Most Cited Cases
There was no requirement that employees of accounting firm, suspected of committing accounting fraud, show prejudice before court would hold government liable for violating their Fifth and Sixth Amendment rights, through pressure applied to cause employer to discontinue payment of their legal expenses; discontinuance forced alteration in plans for legal representation, raising potential of fundamentally altering structure of legal process. U.S.C.A. Const.Amends. 5, 6.

[11] United States 393 ⚖125(9)

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(9) k. Nature of Action in General. Most Cited Cases
Government had sovereign immunity from claim of monetary compensation, brought by employees of accounting firm, which stopped reimbursing legal fees when they were indicted, after government violated their Fifth and Sixth Amendment rights by pressuring employer into taking that action to forestall indictment of firm, despite claim that government could be forced to make payments to employees under court's power to impose sanctions for litigation abuse; sovereign immunity trumped court's supervisory power. U.S.C.A. Const.Amends. 5, 6.

[12] United States 393 ⚖125(9)

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(9) k. Nature of Action in General. Most Cited Cases
Neither Federal Tort Claims Act (FTCA) nor Administrative Procedure Act (APA) waived sovereign immunity so as to allow employees of accounting firm, who were indicted for fraud, to recover from government attorney fees payments from employer discontinued in response to pressure by government that violated their Fifth and Sixth Amendment rights. U.S.C.A. Const.Amends. 5, 6; 5 U.S.C.A. § 702; 28 U.S.C.A. § 1346.

[13] Criminal Law 110 ⚖641.12(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.12 Deprivation or Allowance of Counsel
110k641.12(3) k. Assistance and Compensation of Counsel. Most Cited Cases
Court had ancillary jurisdiction to order accounting firm to advance payments to employees under indictment for committing accounting fraud, as firm had done prior to being pressured by government to discontinue payments, following determination that government violated Fifth and Sixth Amendment rights of employees by applying pressure. U.S.C.A. Const.Amends. 5, 6; 18 U.S.C.A. § 3231.

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KAPLAN, District Judge.

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***335** The issue now before the Court arises at an intersection of three principles of American law.

The first principle is that everyone accused of a crime is entitled to a fundamentally fair trial.[FN1] This is a central meaning of the Due Process Clause of the Constitution.

FN1. U.S. CONST. amend. V (Due Process Clause).

The second principle, a corollary of the first, is that everyone charged with a crime is entitled to the assistance of a lawyer.[FN2] A defendant with the financial means has the right to hire the best lawyers money can buy. A poor defendant is guaranteed competent counsel at government expense.[FN3] This is at the heart of the Sixth Amendment.

FN2. U.S. CONST. amend. VI.

FN3. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

The third principle is not so easily stated, not of constitutional dimension, and not so universal. But it too plays an important role in this case. It is simply this: an employer often must reimburse an employee for legal expenses when the employee is sued, or even charged with a crime, as a result of doing his or her job. Indeed, the employer often must advance legal expenses to an employee up front, although the employee sometimes must pay the employer back if the employee has been guilty of wrongdoing.

This third principle is not the stuff of television and movie drama. It does not remotely approach *Miranda* warnings in popular culture. But it is very much a part of American life. Persons in jobs big and small, private and public, rely on it every day. Bus drivers sued for accidents, cops sued for allegedly wrongful arrests, nurses named in malpractice cases, news reporters sued in libel cases, and corporate chieftains embroiled in securities litigation generally have similar rights to have their employers pay their legal expenses if they are sued as a result of their doing their jobs. This right is as much a part of the bargain between employer and employee as salary or wages.[FN4]

FN4. The existence of this right is not a product of charitable instincts. The law long has recognized that litigation can be expensive and that it could prove difficult to obtain the services of competent employees unless they are protected against the cost of lawsuits that arise out of the employers' business. *E.g., Homestore, Inc. v. Tafeen,* 888 A.2d 204, 218 (Del.2005) (advancement of legal expenses "is actually a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards for its shareholders. The broader salient benefits that the public policy ...

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> seeks to accomplish ... will only be achieved if the promissory terms of advancement contracts are enforced by courts even when corporate officials ... are accused of serious misconduct") (internal quotation marks and footnote omitted).

*336 Most of the defendants in this case worked for KPMG, one of the world's largest accounting firms. KPMG long has paid for the legal defense of its personnel, regardless of the cost and regardless of whether its personnel were charged with crimes. The defendants who formerly worked for KPMG say that it is obligated to do so here. KPMG, however, has refused.

If that were all there were to the dispute, it would be a private matter between KPMG and its former personnel. But it is not all there is. These defendants [FN5] (the "KPMG Defendants") claim that KPMG has refused to advance defense costs to which the defendants are entitled because the government pressured KPMG to cut them off. The government, they say, thus violated their rights and threatens their right to a fair trial.

> FN5. All defendants previously employed by KPMG joined in the motion.

Having heard testimony from KPMG's general counsel, some of its outside lawyers, and government prosecutors, the Court concludes that the KPMG Defendants are right. KPMG refused to pay because the government held the proverbial gun to its head. Had that pressure not been brought to bear, KPMG would have paid these defendants' legal expenses.

Those who commit crimes-regardless of whether they wear white or blue collars-must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend.

Facts

The Thompson Memorandum

In June 1999, then-U.S. Deputy Attorney General Eric Holder issued a document entitled *Federal Prosecution of Corporations* (the "Holder Memorandum") to provide "guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a given case." [FN6] He took pains to make clear that the factors articulated in the memorandum were not "outcome-determinative" and that "[f]ederal prosecutors [we]re not required to reference these factors in a particular case, nor [we]re they required to document the weight they accorded specific factors in reaching their decision." Nevertheless, the language that plays a central role in the present controversy first was found in the Holder Memorandum.

> FN6. *http://www.usdoj.gov/criminal/fraud/policy/ Chargingcorps.html* (last visited June 23, 2006).

The Holder Memorandum set forth some common sense considerations. Prosecutors, in deciding whether to indict a company, should pay attention to things like the nature and seriousness of the offense, the pervasiveness of wrongdoing within the entity, the company's efforts to remedy past misconduct, the adequacy of other remedies, and the like. It mentioned also:

*337 "the corporation's timely and voluntary disclosure of wrongdoing *and its willingness to cooperate in the investigation of its agents,* including, if necessary, the waiver of the corporate attorney-client and work product protection ..." [FN7]

> FN7. Holder Memorandum § II, ¶ 4 (emphasis added).
> The Court, with the consent of the parties, takes judicial notice of the Holder Memorandum.

Section VI elaborated on what was meant by cooperation. The general principle was that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's

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willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work-product privileges." [FN8] The memorandum then set out several paragraphs of commentary, the most relevant for present purposes being this:

FN8. *Id.* § VI, ¶ A.

"Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending upon the circumstances, a corporation's promise of support to culpable employees and agents, either *through the advancing of attorneys fees,* through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." [FN9]

FN9. *Id.* ¶ B (emphasis added).

A footnote to the comment concerning the advancing of attorneys' fees read:
"Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate." [FN10]

FN10. *Id.* ¶ B, n. 3.

Thus, the Holder Memorandum made clear that advancing of attorneys' fees to personnel of a business entity under investigation, except where such advances were required by law, might be viewed by the government as protection of culpable individuals and might contribute to a government decision to indict the entity.

As noted, the Holder Memorandum was not binding. Federal prosecutors were free to take it into account, or not, as they saw fit. But the corporate scandals of the earlier part of this decade changed that.

In late 2001, Enron, Global Crossing, Tyco International, Adelphia Communications and ImClone, among other companies, found themselves in worlds of trouble, much of it apparently of their own making. Bankruptcies and criminal prosecutions followed including, notably, the indictment of Enron's auditors, Arthur Andersen LLP-an indictment that resulted in the collapse of the firm, well before the case was tried.[FN11] And on July 9, 2002, the President issued Executive Order 13271, which established a Corporate Fraud Task Force (the "Task Force") headed by United States Deputy Attorney General Larry D. Thompson.

FN11. *Amici* point out that no major financial services firm has ever survived a criminal indictment. Brief for The Securities Industry Ass'n *et al.* at 6 [docket item 470] (quoting Ken Brown, *et al., Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question,* WALL. , Mar. 15, 2002, at A1).

***338** On January 20, 2003, Mr. Thompson issued a document entitled *Principles of Federal Prosecution of Business Organizations* (the " Thompson Memorandum") which, in many respects, was a modest revision of the Holder Memorandum. Indeed, the language concerning cooperation and advancing of legal fees by business entities was carried forward without change. Unlike its predecessor, however, the Thompson Memorandum is binding on all federal prosecutors. [FN12] Thus, all United States Attorneys now are obliged to consider the advancing of legal fees by business entities, except such advances as are required by law, as at least possibly indicative of an attempt to protect culpable employees and as a factor weighing in favor of indictment of the entity. [FN13]

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FN12. U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 163 (2005) ("The Thompson Memorandum sets forth nine factors that federal prosecutors must consider in determining whether to charge a corporation or other business organization. ") (available online http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm) (last visited June 23, 2006).

FN13. Mr. Thompson was quoted in the press as having defended pressuring companies to cut off payment of defense costs for their employees on the ground that "they [the employees] don't need fancy legal representation" if they do not believe that they acted with criminal intent. Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees,* WALL. , June 4, 2004, A1. Naturally, the Court does not consider it in deciding this matter, as it is not in evidence. It notes, however, that such a view, whether held by Mr. Thompson or anyone else, would be misguided, to say the least.
The innocent need able legal representation in criminal matters perhaps even more than the guilty. In addition, defense costs in investigations and prosecutions arising out of complex business environments often are far greater than in less complex criminal matters. Counsel with the skills, business sophistication, and resources that are important to able representation in such matters often are more expensive than those in less complex criminal matters. Moreover, the need to review and analyze frequently voluminous documentary evidence increases the amount of attorney time required for, and thus the cost of, a competent defense. Thus, even the innocent need substantial resources to minimize the chance of an unjust indictment and conviction.

KPMG Gets Into Trouble and "Cleans House"

While all of this was going on, the Internal Revenue Service ("IRS") began investigating tax shelters, including a number that are subjects of the indictment in this case. In early 2002, it issued nine summonses to KPMG, which was less than fully compliant. Accordingly, on July 9, 2002, the government filed a petition in the United States District Court for the District of Columbia to enforce them.[FN14]

FN14. *United States v. KPMG LLP,* 316 F.Supp.2d 30, 31-32 (D.D.C.2004).
It appears that the IRS was conducting also a penalty promoter audit of KPMG. Tr. (Neiman) 270:8-11.

A few months later, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs "began an investigation into the development, marketing and implementation of abusive tax shelters by accountants, lawyers, financial advisors, and bankers." [FN15] This led to public hearings in November 2003 at which several senior KPMG partners or former partners-three of them now defendants here-testified.[FN16]

FN15. STAFF OF THE PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, THE ROLE OF PROF. FIRMS IN THE U.S. TAX SHELTER INDUS. . 1 (Comm. Print 2005) ("SENATE REPORT ").

FN16. *Id.* at 1-2.

The firm's reception at the hearing was not favorable. Senator Coleman, the subcommittee ***339** chair, for example, opened the hearing by saying that "the ethical standards of the legal and accounting profession have been pushed, prodded, bent and, in some cases, broken, for enormous monetary gain." [FN17] At another point, Senator Levin, the ranking minority member, in obvious

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exasperation at a KPMG witness, suggested that the witness "try an honest answer." [FN18]

FN17. *U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals, Hearings Before the Permanent Subcomm. on Investigation of the S. Comm. on Governmental Affairs,* 108th Cong. 2 (2003).

FN18. *Id.* at 43.

Eugene O'Kelly, then KPMG chair,[FN19] was concerned about the Senate hearing and the IRS proceedings.[FN20] He retained Skadden Arps Slate Meagher & Flom ("Skadden"), and particularly Robert S. Bennett, "to come up with a new cooperative approach." [FN21] One aspect of that new approach was a decision to "clean house"-a determination to ask Jeffrey Stein, Richard Smith, and Jeffrey Eischeid, all senior KPMG partners who had testified before the Senate and all now defendants here-to leave their positions as deputy chair and chief operating officer of the firm, vice chair-tax services, and a partner in personal financial planning, respectively.[FN22]

FN19. Mr. O'Kelly is deceased.

FN20. Tr. (Neiman) 270:8-16.

FN21. *Id.*

FN22. U113, ¶¶ 8, 28-29; *see*SENATE REPORT 2.
Mr. Eischeid was placed on administrative leave and Mr. Smith transferred. Tr. (Neiman) 274:16-20.

Given Mr. Stein's senior position and his relationship with Mr. O'Kelly, [FN23] his departure was cushioned substantially, although many of the facts have come to light only recently. He "retired" from the firm with a $100,000 per month, three-year consulting agreement. He agreed to release the firm and all of its partners, principals, and employees from all claims.[FN24] He and KPMG agreed also that Mr. Stein would be represented, at KPMG's expense, in any suits brought against KPMG or its personnel and himself, by counsel acceptable to both him and the firm or, if joint representation were inappropriate or if Mr. Stein were the only party to a proceeding, by counsel reasonably acceptable to Mr. Stein.[FN25]

FN23. Mr. O'Kelly had selected Mr. Stein as deputy chair of KPMG. *See* Tr. (Loonan) 169:17-21. Although he felt compelled to ask Mr. Stein to retire, he personally negotiated the very generous terms of the severance. *Id.* 167:16-21; 169:23-170:7. Mr. Loonan, who worked out the terms of the written agreement with Mr. Stein's counsel (whose fee for doing the agreement ultimately was borne by KPMG), described the negotiation as " very friendly." *Id.* 168:23-169:16.

FN24. DX 6A, ¶¶ 7, 9(a).
There were limited exceptions that are not relevant here.

FN25. DX 6, ¶ 13.
The agreement provided also that, " [n]otwithstanding any other provision of [the] Agreement," if Mr. Stein were named as a defendant in any action based on his activities with the firm, KPMG would indemnify him "(through its Professional Indemnity Insurance Program)," except as to "wilful or intentional unlawful acts," to the same extent it would have done had he remained with KPMG. DX 6B, ¶ 22.

Despite KPMG's effort to stave off trouble by " cleaning house," much damage already had been done. In the early part of 2004, the IRS made a criminal referral to the Department of Justice ("DOJ "), which in turn passed it on to the United States Attorney's Office for this district ("USAO").[FN26]

FN26. The United States Attorneys' Manual explains the process as follows:
"The IRS' Criminal Investigation Division

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(CID) is responsible for investigating violations of the criminal provisions of the internal revenue laws, including cases falling within the General Enforcement Plea Program ... and related violations of the criminal provisions of 18 U.S.C. CID special agents are responsible for conducting administrative investigations ... of alleged criminal violations arising under the internal revenue laws.

"Upon concluding an administrative investigation, a special agent recommending prosecution must prepare a special agent's report (SAR) that details the investigation and the agent's recommendations. After review within CID, the SAR, together with the exhibits, is reviewed by District Counsel ... When prosecution is deemed warranted, District Counsel prepares a criminal reference letter (CRL) and refers the matter ... either to the Tax Division or, in those circumstances when direct referral of certain classes of cases is authorized, to the United States Attorney ... The CRL discusses the nature of the crime(s) for which prosecution is recommended, the evidence relied upon to prove it, technical aspects and anticipated difficulties of prosecution, and the prosecution recommendations themselves." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 6-4.110 (1997) (hereinafter "UNITED STATES ATTORNEYS' MANUAL"). *See also id.* § 6-4.122. It appears that the decision whether to prosecute complex tax matters referred by the IRS is made by the Tax Division of the DOJ. *Id.* 6-4.212, subd. 1.

***340** *KPMG's Policy on Payment of Legal Fees*

KPMG's policy prior to this matter concerning the payment of legal fees of its partners and employees is clear. While KPMG's partnership agreement and by-laws are silent on the subject, the parties have stipulated as follows:

"1. Prior to February 2004, ... it had been the longstanding voluntary practice of KPMG to advance and pay legal fees, without a preset cap or condition of cooperation with the government, for counsel for partners, principals, and employees of the firm in those situations where separate counsel was appropriate to represent the individual in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee.

"2. This practice was followed without regard to economic costs or considerations with respect to individuals or the firm.

"3. With the exception of the instant matter, KPMG is not aware of any current or former partner, principal or employee who has been indicted for conduct arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee since [two partners] were indicted and convicted of violation of federal criminal law in 1974. Although KPMG has located no documents regarding payment of legal fees in that case, KPMG believes that it did pay pre- and post-indictment legal fees for the individuals in that case."

The Court infers and finds that KPMG in fact paid the pre- and post-indictment legal fees for the individuals in the 1974 criminal case. Moreover, the extent to which KPMG has gone is quite remarkable. In one recent situation involving KPMG's relationship with Xerox Corporation, it paid over $20 million to defend four partners in a criminal investigation and related civil litigation brought by the Securities and Exchange Commission.[FN27]

FN27. Tr. (Loonan) 129:23-130:18.

The Initial Discussion between the USAO and Skadden

When the referral reached the USAO on February 5, 2004, it came under the supervision of Shirah Neiman, who was chief counsel to the United States Attorney, the USAO's liaison to the IRS, a participant in the drafting of the Holder Memorandum, and a very experienced prosecutor.

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FN28 The *341 USAO notified Skadden of the referral, and a meeting was scheduled for February 25, 2004.

FN28. Tr. (Neiman) 264:9-266:6, 268:3-9.

In the meantime, on February 9, 2004, the USAO prepared "subject" letters-letters advising the recipient that he or she "is a person whose conduct is within the scope of [a] grand jury's investigation" [FN29]-to between 20 and 30 KPMG partners and employees, including all but five of the defendants in this case.[FN30]

FN29. UNITED STATES ATTORNEYS' MANUAL § 9-11.151.

FN30. Tr. (Okula) 85:22-25, 92:25-93:12; K159-84; Docket item 524 (letter, Stanley J. Okula, May 22, 2006). It appears that the letters were hand-delivered between February 18 and 26, 2004, with most delivered by February 20, 2004. *Id.*

In preparation for the meeting, Ms. Neiman, Assistant United States Attorneys ("AUSA") Weddle and Okula, and other members of the prosecution team conferred. They decided to ask Skadden whether KPMG was paying the legal fees of individuals under investigation.[FN31] Accordingly, the government prepared a document headed "Skadden Meeting Points" setting forth matters that the government intended to discuss at the meeting.[FN32] The first page of the three-page list contained an item that read:

FN31. Tr. (Okula) 66:15-19.

FN32. *Id.* 63:23-64:21; *see id.* (Neiman) 282:17-283:16.

" Is KPMG paying/going to pay the legal fees of employees? Current or former?
What about taxpayers?
Who?
Any agreements or other obligations to do so? What are they?" [FN33]

FN33. U6; U98.

The meeting was attended by Mr. Bennett, Ms. Neiman, and many others on both sides. Mr. Weddle began by telling Skadden that the government was there to hear what Skadden had to say and that it had a few questions. Mr. Bennett explained that Skadden had been hired in view of Mr. O'Kelly's concern about the controversy with the IRS and the Senate hearings and that KPMG had decided to clean house and change the atmosphere at the firm. He reported that the firm had taken high-level personnel action already, that it would cooperate fully with the government's investigation, and that the object was to save KPMG, not to protect any individuals. In an obvious reference to the fate of Arthur Andersen, he said that an indictment of KPMG would result in the firm going out of business.[FN34]

FN34. *Id.* (Neiman) 269:19-271:12.

After a discussion of the structure of KPMG and of potential conflicts of interest, Mr. Weddle "got to the subject of legal fees and asked whether KPMG was obligated to pay fees and what their plans were. " [FN35] Mr. Bennett tested the waters to see whether KPMG could adhere to its practice of paying its employees' [FN36] legal expenses when litigation loomed. He asked for government's view on the subject.[FN37] Ms. Neiman said that the government would take into account KPMG's legal obligations, if any, to advance legal expenses, but referred specifically to the Thompson Memorandum as a point that had to be considered.[FN38]

FN35. *Id.* 271:13-272:10.; *id.* (Pilchen) 23:4-7, 32:25-33:2; U113 ¶ 23.
Mr. Weddle asked also for copies of KPMG's partnership agreement and by-laws. K313; U105.

FN36. The Court includes KPMG partners

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in the term "employees" for ease of expression.

FN37. *Id.;* Tr. (Pilchen) 23:8-12; K313.

FN38. *Id.* 23:12-15; *id.* (Okula) 75:20-76:1.

*342 At or about that point, Messrs. Bennett and Bialkin told the USAO that KPMG's "common practice" had been to pay legal fees. They added that the partnership agreement was vague and that Delaware law gave the company the right to do whatever it wished, but said that KPMG still was checking on its legal obligations. It would not, however, pay legal fees for employees who declined to cooperate with the government, or who took the Fifth Amendment, as long as it had discretion to take that position.[FN39]

FN39. K313; U105; U116 ¶¶ 24-25; Tr. (Neiman) 273:13-17; *id.* (Pilchen) 24:6-19.

The conversation then shifted briefly to a discussion of the personnel changes that KPMG had made.[FN40] Mr. Bennett reported that Messrs. Stein, Eischeid, and Smith had been asked to leave, but explained that neither KPMG nor Skadden had done an internal investigation to determine who were "bad guys" or whether any crime had been committed.[FN41] Almost immediately, Mr. Weddle reverted to the subject of attorneys' fees, asking Mr. Bennett to determine KPMG's obligations in that regard.[FN42] Ms. Neiman then said that " misconduct" should not or cannot "be rewarded" and referred to federal guidelines.[FN43]

FN40. U116, ¶¶ 27-30; Tr. (Neiman) 274:4-25.

FN41. Tr. (Neiman) 274:3-8; *id.* (Okula) 110:3-5; U106, ¶ 26; U116, ¶ 28.

FN42. U117, ¶ 31; K313.

FN43. U117, ¶ 31; U106, ¶ 27; K313

There is no dispute, and the Court finds, that this comment came immediately on the heels of a statement by Mr. Bennett relating to lawyers for KPMG partners.[FN44] There are disputes, however, about precisely what Ms. Neiman said about " guidelines" and what she meant by it.[FN45] The parties have focused in particular on whether Ms. Neiman intended her remark to be directed to the legal fee issue-*i.e.,* to be a statement to the effect that payment by KPMG of employee legal fees could be viewed as rewarding misconduct-or to be directed instead at any severance arrangements between KPMG and Messrs. Stein, Eischeid, and Smith. Ms. Neiman testified that her intent was the latter.[FN46] But the Court finds it unnecessary*343 to decide Ms. Neiman's subjective purpose in making the remark because what is more important is how her comment was understood.

FN44. *E.g.,* Tr. (Neiman) 275:3-10; *id.* (Pilchen) 21:12-23:16: *id.* (Okula) 114:13-115:2.

FN45. According to Ms. Neiman, she said "that the federal sentencing guidelines specifically address in its corporate compliance section the issue of providing discipline for people who engage in misconduct, and [that KPMG] can't reward misconduct and you have to be mindful of that." (Tr. (Neiman) 275:3-10) The Court assumes that this was what went through her mind and does not question the sincerity of the testimony. The contemporaneous notes and subsequent memorandum of the government's designated note taker and the contemporaneous notes of a Skadden partner, however, do not refer to corporate compliance and contain the word " guidelines" without specifying sentencing guidelines or the Thompson Memorandum. U106, ¶ 28; U117, ¶ 31; K313. The Court is not persuaded that Ms. Neiman, whatever she had in mind, referred to the sentencing guidelines or to corporate compliance. She said, without elaboration, that misconduct cannot or

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should not be rewarded under federal guidelines. It is no stretch to conclude that this remark was taken by those who heard it as a reference to the Thompson Memorandum. In fact, KPMG's present chief legal officer, former U.S. District Judge Sven Erik Holmes, referred in a different context to the Thomson Memorandum as the "Thompson Guidelines" in a civil deposition. Docket item 544, Ex. B, at 74-75.

FN46. The government's post-hearing brief attempts to support Ms. Neiman's claim that she referred to the federal sentencing guidelines, not to the Thompson Memorandum, and that she was speaking at the time of corporate compliance programs. It maintains that "Ms. Neiman consistently refers to the Sentencing Guidelines when lecturing on the issues of corporate compliance programs and cooperation" and appends a copy of a lecture she gave on the subject that referred to the sentencing guidelines. Docket item 510 at 20; *id.* Ex. A. It attaches also a copy of an interview with former Deputy Attorney General Comey regarding waiver of privileges by corporate entities under the Thompson Memorandum. In light of these materials, it maintains, the Court should find that Ms. Nieman referred to the sentencing guidelines and that her warning against rewarding misconduct was intended to encourage KPMG to take appropriate personnel actions against culpable employees and not as a reference to payment of legal fees. *Id.* at 21-23; *id.* Ex. B.
The Court declines to consider the appended material. The government could have sought to examine Ms. Neiman about her lecture at the hearing and could have called Mr. Comey as a witness. It did neither. To consider these materials, first submitted after the conclusion of the hearing, would deprive the KPMG Defendants of the right to cross-examine. Even more important, the documents are not probative, and at least not strongly so, of what Ms. Neiman said to KPMG in the February 25, 2004 meeting and what KPMG understood from her comment. Accordingly, they would not alter the result even if the Court considered them.

As Ms. Neiman's remark came immediately after a statement concerning whether KPMG would be paying for lawyers for its personnel, it would have been quite natural to understand the comment as having been directed at payment of legal fees. And that is exactly what happened:
• The IRS agent's handwritten notes, taken at the meeting, state:
"BB-[illegible] Skadden may recommend lawyers for this. Wants lawyers who understand cooperation is the best way to go in this type of case. He feels it is in the best interests of KPMG for its people to get attorneys that will cooperate with Go[vt]. Want to save the firm.
"Per SN
Fees-under Federal Guideline-Misconduct C/N Be rewarded.
JW-figure out firms obligations ~~and~~ [illegible]" FN47

FN47. U106.

• The IRS agent's typewritten memorandum, prepared from her notes, state:
"31. AUSA Weddle finally asked Mr. Bennett to find out what KPMG's obligations would be. Shirah Neiman further advised them that under the federal guidelines misconduct can not be rewarded." FN48

FN48. U117.

• Skadden's Mr. Pilchen recorded:
"SP-No decisions made. No counsel have been recommended-we have had discussions @ what the firm does in typical situations-but no final decisions made.

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"SN-misconduct shdn't be rewarded." [FN49]

FN49. K313.

• Not long afterward, Mr. Pilchen told a lawyer for a KPMG employee that the government had implied that it preferred that KPMG not pay employee legal fees. [FN50]

FN50. K316-17; *cf.* Tr. (Michael) 44:9-45:17.

• AUSA Okula testified:
"Q In response to the topic of cooperation, isn't it a fact that Shirah Neiman goes back to the fees and says, well, remember, we're looking at that under federal guidelines. Yes or no?
"A Yes.
"Q And that was about fees, wasn't it?
"A Fees, yes, that's what it says.
"Q It wasn't about terminating Eischeid or Stein or anybody else. It was *344 about paying fees and cooperation. Correct?
"A Correct." [FN51]

FN51. Tr. (Okula) 124:24-125:13.
This testimony was given with respect to the IRS agent's note of Ms. Neiman's remark to the effect that misconduct should not be rewarded. U106. That note came immediately after a note of a statement by Mr. Bennett that he felt it was "in the best interests of KPMG for it's [*sic*] people to get attorneys that will cooperate with Go[vt]" and that he wanted to "save the firm." *Id.*
Elsewhere in his testimony, Mr. Okula implied that he believed that Ms. Neiman's remark was a comment on the fact that Mr. Stein had been "let go with a severance package that exceeded $8 million or $10 million," which Mr. Okula thought inconsistent with an attempt by Skadden to claim credit for taking aggressive personnel action. Tr. (Okula) 115:3-13. This testimony, the Court finds, was mistaken.
The parties have stipulated that KPMG did not produce Mr. Stein's severance agreement to the government until recently. Tr. 181:18-24; *see also* Weddle Decl. [docket item 435] ¶ 7. Moreover, at an August 4, 2004 meeting, Karen Seymour, chief of the criminal division of the USAO, told Skadden that "KPMG's employment actions to grant rich severance packages without making statements to the public, or privately to its employees, of the wrongdoing that went on " was a "troubling issue under the ' Thompson Memo.' " U72; *see* Tr. (Loonan) 154:22-155:20. Notes of the meeting produced by the government indicate that Mr. Weddle was "very upset about this." U51.
It is difficult to see why the size of Mr. Stein's severance package would have provoked such a response in August 2004 if, as Mr. Okula suggested, its terms had been disclosed in February. In all the circumstances, the Court finds that the government was unaware at the time of the February 25, 2004 meeting of the financial arrangements between Mr. Stein and KPMG.

In sum, Ms. Neiman's comment that "misconduct" cannot or should not "be rewarded" under "federal guidelines," whatever went through her mind when she said it, was understood by both KPMG and government representatives as a reminder that payment of legal fees by KPMG, beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm. And if there were any doubt that this was the message conveyed, the doubt quickly was dispelled by Mr. Weddle. As Mr. Pilchen's notes recorded, he followed up Ms. Neiman's comment by saying:
"JW-*if u have discretion re fees-we'll look at that under a microscope.*" [FN52]

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FN52. K314 (emphasis in original). This comment appears only in Mr. Pilchen's notes, and no witness at the hearing had any present recollection of it. Nevertheless, Mr. Pilchen testified that his notes were an effort "to record [his] impressions and recollections of what was being said." Tr. 19:16-17. The notes specifically attribute the remark to Mr. Weddle, which is not consistent with their being a recordation of a subjective thought by Mr. Pilchen. Mr. Pilchen underlined them. In light of the memorable language and these additional circumstances, the Court finds that Mr. Weddle made the comment.

Thus, while the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion.[FN53]

FN53. Mr. Okula frankly admitted that it was his personal view that KPMG should not pay the fees. Tr. (Okula) 69:1-4.

KPMG Gets the Message

Shortly after the February 25, 2004 meeting, Mr. Bennett got back to Mr. Weddle on the legal fee issue. He reported that KPMG did not think it had any binding legal obligation to pay legal fees,[FN54] *345 but that "it would be a big problem" not to do so because the firm was a partnership. He said that KPMG was planning on putting a cap, or limit, on fees and conditioning their payment for any given partner or employee on that individual "cooperating fully with the company and the government." [FN55] Apparently satisfied with the government's response, KPMG began to implement the policy.

FN54. KPMG was blatantly self-interested on this point. While the Thompson Memorandum countenances compliance with legal obligations to advance fees, KPMG had an interest in avoiding advancement of fees if its legal obligation to do so might be questioned, as the government might view advancement of fees as protecting culpable personnel. Those of its partners and employees who were or might become subjects of the investigation, on the other hand, had an interest in taking the broadest possible view of KPMG's legal obligations.
In these circumstances, it is of more than passing interest that the government, which knew or at least was chargeable with knowledge of this obvious fact, appears to have made no effort to verify KPMG's claim beyond asking for and presumably reading the partnership and by-laws. There is no evidence, for example, that it ever inquired into exactly what KPMG's practices had been in this regard.
Nor did the government question the obvious conflict of interest manifest in Skadden's offer to recommend as counsel to targeted KPMG employees "law firms that were familiar with these types of proceedings and who understood that cooperation with the government was the best way to proceed." U119, ¶ 56; U106. Cooperation may have been the best way for KPMG to proceed, but it was not necessarily best for its employees. Skadden's effort to curry favor with the government by offering to seek to compromise the interests of KPMG's employees by inducing them to retain counsel who would serve KPMG's interest in cooperating and the government's apparent failure to take issue with it both are quite disturbing.

FN55. U30.

On March 4, 2004, Mr. Pilchen of Skadden spoke to Mr. Townsend, an attorney for defendant Carolyn Warley. He told Townsend that KPMG would pay his fees so long as Ms. Warley cooperated with the government. For example, he said, no fees would be paid if Ms. Warley invoked her privilege against self-incrimination under the Fifth Amendment.[FN56]

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FN56. U316-17; Tr. (Michael) 41:16-44:8.

On March 11, 2004, the Skadden team had a conference call with the USAO. Mr. Bennett assured the USAO that KPMG would be "as cooperative as possible" so that the office would not exercise its discretion to indict the firm. Mr. Weddle urged that KPMG tell its people that they should be "totally open" with the USAO, "even if that [meant admitting] criminal wrongdoing." He commented that this would give him good material for cross-examination,[FN57] a statement that strongly indicates that at least the lead line AUSA on the case expected, even at this stage, to prosecute individuals.

FN57. U318-19; Tr. (Michael) 45:22-50:12.

The actions of the USAO, coupled with the Thompson Memorandum, had the desired effect. On the same date, Skadden's Mr. Rauh wrote to the USAO, enclosing among other things a form letter that Skadden was sending to counsel for the KPMG Defendants then employed by KPMG who had received subject letters from the government or otherwise appeared to be under suspicion.[FN58] The form letter stated that KPMG would pay an individual's legal fees and expenses, up to a maximum of $400,000, on the condition that the individual "cooperate with the government and ... be prompt, complete, and truthful." [FN59] Importantly, however, it went even further. It made clear that *"payment of ... legal fees and expenses will cease immediately if ... [the recipient] is charged by the government with *346 criminal wrongdoing."*[FN60] In addition, on March 12, 2004, Joseph Loonan, then KPMG's deputy general counsel, sent an advisory memorandum to a broader audience of KPMG personnel regarding potential contacts by the government.[FN61] The memorandum urged full cooperation with the investigation. But it advised also that recipients had a right to be represented by counsel if they were contacted by the government, mentioned some advantages of consultation with counsel, and stated that KPMG had arranged for independent counsel for those who wished to consult them.[FN62]

FN58. K5-16.

FN59. *Id.* at 15-16.

FN60. *Id.* at 16 (emphasis added).

FN61. Skadden sent a copy to the government on the same day. K270.

FN62. K271-73; Tr. (Loonan) 145:2-149:22.
The memorandum indicated also that KPMG would "be responsible for the payment of reasonable fees and related expenses in connection with ... representation regarding this investigation." K271-73, at 272. The failure to indicate that payment of legal fees would cease if the recipient were charged or to refer to the $400,000 cap apparently is attributable to the fact that those limitations were contained in letters sent to counsel for persons who already had received subject letters from the government while the advisory memorandum went to a broader group.

The USAO took no issue with KPMG's announcement that it would cut off payment of legal fees for anyone who was indicted and that it would condition the limited pre-indictment payments on cooperation with the government. The advisory memorandum, on the other hand, upset Mr. Weddle and Kevin Downing, another member of the prosecution team.[FN63] They immediately advised Skadden that it was "disappointed with [its] tone" and allegedly "one-sided presentation of potential issues" and demanded that KPMG send out a supplemental memorandum in a form they proposed. [FN64] The only significant point of difference between the memorandum that the government demanded and Mr. Loonan's original memorandum was the language in the government's proposal italicized below:

FN63. Tr. (Loonan) 149:23-150:1.

FN64. K275-77.

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"Employees are not required to use this counsel, or any counsel at all. Rather, employees are free to obtain their own counsel, *or to meet with investigators without the assistance of counsel.* It is entirely your choice." FN65

FN65. U276 (emphasis added).

In due course, KPMG capitulated to the USAO demand. It put out in "Q & A" format a document containing the following language:
"*Do I have to be assisted by a lawyer?*
"**Answer:** No. Although we believe that it is probably in your best interests to consult with a lawyer before speaking to government representatives, whether you do so is entirely your choice. *As we said in the March 12 OGC [Office of General Counsel] memorandum, you may deal directly with government representatives without counsel.* In any event, the Firm expects you to cooperate fully with the government representatives and provide complete and truthful information to them." FN66

FN66. U294-308, at U299 (emphasis added).
The USAO's demand was a focus of a meeting or telephone call with Skadden on March 29, 2004. Mr. Bennett protested that it had sent out memoranda such as those that had been sent on behalf of KPMG in other matters without objection. He emphasized that KPMG would not even pay attorneys' fees unless its personnel agreed to cooperate and that it would cut off payments to KPMG personnel who invoked the Fifth Amendment. Nevertheless, he ultimately acquiesced in the government's demands, stating that KPMG was in the process of sending out in "Q & A format" a "more balanced approach." K321.

*347 This exchange is revealing. No one suggests that either the original KPMG advice or the government's subsequent proposal misstated the law. The difference was one of emphasis. But it is entirely plain that the government's purpose in demanding the supplement was to increase the chances that KPMG employees would agree to interviews without consulting or being represented by counsel, whether provided by KPMG or otherwise.

The Government Presses Its Advantage

The KPMG lawyers met again with the USAO on March 29, 2004. In an effort to demonstrate that KPMG was cooperating, Skadden asked the government to notify it if any current or former KPMG employee refused to meet with prosecutors or otherwise failed to cooperate.FN67

FN67. U32; *see also, e.g.,* K30; K43.

From that point forward, the government took full advantage. It repeatedly notified Skadden when KPMG personnel failed to comply with government demands.FN68 In each case, Skadden promptly advised the attorney for the individual in question that the payment of legal fees would be terminated " [a]bsent an indication from the government within the next ten business days that your client no longer refuses to participate in an interview with the government." FN69 In some cases, the individuals in question relented under pressure of the threats from KPMG and submitted to interviews with the government. In others, they did not, whereupon KPMG terminated their employment and cut off the payment of legal fees.FN70

FN68. *See, e.g.,* K30; K43; K44.1; K47; K49; K55; K56; K60; K66; K81; K127; K268; *see also* K68.

FN69. *See, e.g.,* K42-43; K44-44.1; K45; K51; K57-58; K61-62; K68; K76-77; *see also* K129 (suspending payment of legal fees and warning that payment would be discontinued entirely absent indication of cooperation from the government); K134 (same).

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FN70. *See, e.g.,* K54; K68; K93; K126; K132-33; K186-90.

The Conclusion of the Investigation, KPMG's Stein Problem and the Deferred Prosecution Agreement

As the matter unfolded, meetings between KPMG and its counsel and the USAO continued, with KPMG seeking a resolution short of an indictment of the firm and the government pressing for admissions of extensive wrongdoing, a great deal of money, and changes in KPMG's business.

On August 4, 2004, the KPMG executives and lawyers met with Karen Seymour, then chief of the criminal division of the USAO, and other prosecutors. In the course of the meeting, Ms. Seymour said that the government had learned that KPMG had granted rich severance packages to certain executives and that this raised a "troubling issue under the 'Thompson Memo.' " [FN71] Mr. Bennett deflected the issue, agreeing that severance packages were "high in one or two cases" but reiterating that KPMG's "expectation" was that legal fees of individuals would be paid only up to $400,000 and only on condition that recipients cooperated with the government.[FN72] But the Stein severance agreement was not produced.

FN71. U69-77, at U72.

FN72. *Id.*

As time went by, KPMG came to view the Stein severance agreement as something of a ticking bomb. For one thing, KPMG had not adhered in Mr. Stein's case to the $400,000 pre-indictment legal fee cap that it had adopted in response to government pressure. It passed that figure by late October 2004,[FN73] and so was at ***348** odds with its representation to the government.[FN74] For another, it had known since August 2004 that the USAO was unhappy that rich severance packages had been given to senior executives.[FN75]

FN73. Docket item 512, Att. A, ¶ 6.

FN74. KPMG sought to explain this by suggesting that it had paid $646,000 in fees for both the criminal investigation and for civil litigation and that its representations to the government therefore may not have been inaccurate. Tr. (Loonan) 182:19-185:13. In fact, however, the parties later stipulated that KPMG paid $646,757.80 in Mr. Stein's legal fees for the criminal investigation alone. Docket item 512, Att. A, ¶ 5.

FN75. The record is unclear as to exactly when the government learned the economic terms of the severance packages with Messrs. Stein and others, although it certainly was aware by August 2004 of the fact that they were sizeable. KPMG's Mr. Loonan testified that the government at some point was told the size of Mr. Stein's package, but he did not say when. In any case, his testimony leaves considerable doubt as to whether he had personal knowledge of the facts. Tr. (Loonan) 180:17-25.

Notwithstanding this problem, KPMG repeatedly tried to convince the USAO not to indict the firm, touting its cooperation with the investigation and its limitation of attorneys' fees for individuals. In meetings in March 2005 with David N. Kelley, then United States Attorney, however, this approach did not yield the desired result. Indeed, on March 2, 2005, Mr. Kelley interrupted Mr. Bennett's claim that the firm had cooperated by saying, "Let me put it this way. I've seen a lot better from big companies." [FN76] That meeting, in the words of KPMG's Mr. Loonan, was "not particularly encouraging," [FN77] and a subsequent meeting in New York went no better.

FN76. U334-36, at 336.

FN77. Tr. (Loonan) 187:15-17.

With the scene about to shift to Washington and a last-ditch effort to prevent an indictment by an appeal at the highest levels of the Justice

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Department, KPMG's objective was "to be able to say at the right time with the right audience, we're in full compliance with the Thompson Guidelines." FN78 It concluded that the Stein situation involved too great a risk. So on May 5, 2005, eight days before KPMG was to meet with U.S. Deputy Attorney General James Comey to plead its case, KPMG unilaterally terminated the consulting services portion of the severance agreement and cut off payment of Mr. Stein's attorneys' fees.FN79 It did so, as Mr. Loonan candidly admitted, "because [KPMG] thought it would help [the firm] with the government." FN80

FN78. Docket item 544, Ex. B, at 74-75. This civil deposition was received in evidence in this matter. Docket item 558.

FN79. DX 7; Tr. (Loonan) 190:22-191:4.

FN80. *Id.* 196:13-23. KPMG unpersuasively sought to explain the payment of almost $650,000 in legal fees as an oversight and the termination of payments as consistent with the severance agreement. It has offered no justification for terminating the consulting payments. Nor does the Court credit its benign excuses for cutting off payment of the legal fees. It did so purely to create a response for use in the event the government were to discover that KPMG had exceeded the cap on legal costs that it had told the government it had imposed.

Having dealt, as best it could, with the Stein problem, KPMG turned to attempting to persuade Deputy Attorney General Comey not to indict the firm. The meeting took place on June 13, 2005. Once again, Mr. Bennett relied upon KPMG's cooperation with the government, in addition of course to other arguments. A Skadden memorandum of the meeting recounts some of his remarks as follows:

***349** "In addition, it [KPMG] had done something ' never heard of before'-conditioned the payment of attorney's fees on full cooperation with the investigation. 'We said we'd pressure-although we didn't use that word-our employees to cooperate. We told employees that attorney fees would not be paid unless they fully cooperated with the investigation.' He noted that whenever an individual indicated he or she would not cooperate, 'Justin [Weddle] or Stan [Okula] would tell us,' and KPMG took action. He went on to note that ' what played out' was that current or former personnel who otherwise would not have cooperated did cooperate, and those who did not had their fees cut off and, in two instances, were separated from the firm. This process exhibited 'a level of cooperation that is rarely done.'

* * *

"He noted that what was really 'precedent-setting' about the case was the conditioning of payment of legal fees on cooperation." FN81

FN81. U347-51, at 349-51.

This time, KPMG was more successful.

The Deferred Prosecution Agreement and the Indictment in This Case

On August 29, 2005, KPMG and the government entered into a Deferred Prosecution Agreement (" DPA"). KPMG agreed, among other things, to waive indictment, to be charged in a one-count information, to admit extensive wrongdoing, to pay a $456 million fine, and to accept restrictions on its practice. The government agreed that it will seek dismissal of the information if KPMG complies with its obligations.FN82 In a nutshell, KPMG stands to avoid a criminal conviction if it lives up to its part of the bargain.

FN82. *United States v. KPMG LLP,* 05 Crim. 0903(LAP), docket item 4 (filed Aug. 29, 2005).

One additional aspect of the DPA is noteworthy in

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the present context. The DPA obliges KPMG to cooperate extensively with the government, both in general and in the government's prosecution of this indictment. It provides in part:

"7. KPMG acknowledges and understands that its cooperation with the criminal investigation by the Office [USAO] is an important and material factor underlying the Office's decision to enter into this Agreement, and, therefore, *KPMG agrees to cooperate fully and actively with the Office, the IRS, and with any other agency of the government designated by the Office ('Designated Agencies') regarding any matter relating to the Office's investigation about which KPMG has knowledge or information.*

"8. KPMG agrees that its continuing cooperation with the Office's investigation shall include, *but not be limited to,* the following:

"(a) Completely and truthfully disclosing all information in its possession to the Office and the IRS about which the Office and the IRS may inquire, including but not limited to all information about activities of KPMG, present and former partners, employees, and agents of KPMG;

* * *

"(d) Assembling, organizing, and providing, in responsive and prompt fashion, and, upon request, expedited fashion, all documents, records, information, and other evidence in KPMG's possession, custody, or control as may be requested by the Office or the IRS;

"(e) Not asserting, in relation to the Office, any claim of privilege (including ***350** but not limited to the attorney-client privilege and the work product protection) as to any documents, records, information, or testimony requested by the Office related to its investigation ... [; and]

"(f) Using its reasonable best efforts to make available its present and former partners and employees to provide information and/or testimony as requested by the Office and the IRS, including sworn testimony before a grand jury or in court proceedings, as well as interviews with law enforcement authorities ...

"9. KPMG agrees that its obligations to cooperate will continue even after the dismissal of the Information, and *KPMG will continue to fulfill the cooperation obligations set forth in this Agreement in connection with any investigation, criminal prosecution or civil proceeding brought by the Office* or by or against the IRS or the United States relating to or arising out of the conduct set forth in the Information and the Statement of Facts and relating in any way to the Office's investigation." [FN83]

FN83. *Id.* ¶¶ 7-9 (emphasis added).

The cooperation provisions of the DPA thus require KPMG to comply with demands by the USAO in connection with this prosecution, with little or no regard to cost. If it does not comply, it will be open to the risk that the government will declare that KPMG breached the DPA and prosecute the criminal information to verdict. Anything the government regards as a failure to cooperate, in other words, almost certainly will result in the criminal conviction that KPMG has labored so mightily to avoid, as the admissions that KPMG now has made would foreclose a successful defense.

At about the same time, the government filed the initial indictment in this case. True to its word, KPMG cut off payments to the defendants of legal fees and expenses.

The Present Motion

The Government's Initial Response

On January 19, 2006, the KPMG Defendants moved to dismiss the indictment or for other relief on the ground that the government had interfered improperly with the advancement of attorneys' fees by KPMG in violation of their constitutional and other rights.

The government filed its memorandum in opposition to this and other motions on March 3, 2006.[FN84] It represented:

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FN84. The memorandum bore the names of Messrs. Weddle and Okula and two other AUSAs, in that order.

"With respect to the facts[,] KPMG, which determined that it had no obligation under either Delaware partnership law or contract to advance legal fees at all, *decided of its own volition* that it would in fact advance such fees, but subject them to certain limitations. That KPMG, an entity that by its own admission engaged in a breathtaking tax fraud conspiracy with and through the defendants and others, may have made that decision as a matter of good partnership governance and in order to better position itself with prosecutors, does not detract from the fact that *it was KPMG's decision alone.* Tellingly, the defendants have not-and indeed cannot-point to any evidence supporting their spurious claims that the United States ' coerc[ed]' or 'bull [ied]' KPMG into making its decision to limit the advancement of fees." [FN85]

FN85. Docket item 346, at 164 (emphasis added).

*351 The motion was heard on March 30, 2006. In the course of the argument, the government, for the first time, took the position that it had "no objection whatsoever to KPMG exercising its free and independent business judgment as to whether to advance defense costs ... and that if it were to elect to do so the government would not in any way consider that in determining whether [KPMG] had complied with the DPA." [FN86]Nevertheless, the Court expressed concern about the impact of the Thompson Memorandum on KPMG's decision with respect to the payment of legal fees and ultimately invited the defendants to make a written submission as to the precise factual issue(s) as to which they sought an evidentiary hearing.[FN87]

FN86. Tr., Mar. 30, 2006, at 37.

FN87. Tr., Mar. 30, 2006, at 128:19-129:7.

The government sought to avoid a hearing. It responded to the defendants' submission with a declaration by Mr. Weddle and a letter brief.

Mr. Weddle's declaration stated in relevant part:
"2. On February 25, 2004, legal counsel for KPMG met with me and other representatives of the United States Attorney's Office for the first time in connection with this investigation. At this meeting, among other things:

* * *

"d. KPMG's lawyers stated that they were looking into the issue of their obligations to pay fees, and indicated that if it was within KPMG's discretion whether to pay fees, KPMG would not pay fees for individuals who do not cooperate.
"e. *The Government did not instruct or request KPMG to implement that plan or to implement a contrary plan.*
"3. * * * *Once again, in this call [March 2, 2004], the Government did not tell KPMG's counsel that KPMG's decision to pay legal fees was improper, nor did we instruct or request KPMG to change its decision about paying fees, capping the payment of fees, or conditioning of fees on an employee's or a partner's cooperation.* " [FN88]

FN88. Weddle Decl., docket item 435 (emphasis added).

The letter brief [FN89] stated:

FN89. Docket item 432. The letter brief was signed by Mr. Weinstein. As he was not present at the February 25, 2004 meeting with Skadden and there is no evidence that he was involved in the later communications with Skadden described above, the Court assumes that his letter brief simply repeated the facts set out in Mr. Weddle's declaration and prior submissions.

"The Government did not instruct or request

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KPMG to implement that plan [*i.e.,* KPMG's plan to advance fees subject to a cap and a requirement of cooperation with the government] *or to implement a contrary plan.*

* * *

"Once again, the Government did not tell KPMG that its decision to pay legal fees was improper. *Nor did the Government instruct or request KPMG to change its decision about paying fees, capping the payment of fees, or conditioning the payment of fees on an employee's or a partner's cooperation.*

* * *

"In sum, during the course of its dealings with KPMG, *the United States Attorney's Office did not instruct KPMG whether KPMG should pay legal fees, *352 whether KPMG should cap the payment of legal fees, or whether KPMG should condition the payment of legal fees.*" [FN90]

FN90. Docket item 432, at 2, 3 (emphasis added).

Prehearing Proceedings

On April 12, 2006, the Court ordered an evidentiary hearing and limited discovery on the motion and, particularly, on "whether the government, through the Thompson Memorandum or otherwise, affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees with respect to the investigation and prosecution of this case and such subsidiary issues as relate thereto." [FN91] The order granted the KPMG Defendants leave to serve a Rule 17(c) subpoena on KPMG for documents.

FN91. Docket item 436, at 2.

Without getting into unnecessary detail, it is fair to say that KPMG's participation from that point on was more extensive than simply responding to the subpoena. It sought to block or, at least, delay issuance of the subpoena while it tried to broker stipulations between defendants and the government in an effort to limit the scope of discovery from KPMG and testimony by its personnel.[FN92] It sought and obtained, for its own convenience, a delay of the hearing.[FN93] And it obtained leave for its counsel appear not only for the purpose of responding to the subpoena "in this matter," but " for any purposes relating to this matter that the Court may so [*sic*] order." [FN94]

FN92. Docket item 547.

FN93. Docket item 448.

FN94. Docket item 450, 455.

The Hearing

The Court conducted an evidentiary hearing on May 8-10, 2006. Counsel for KPMG were present throughout. At the conclusion of argument by other counsel, the Court addressed counsel for KPMG: "You certainly have notice that a remedy is being sought against your client, and I'm now making it clear in words of one syllable. You will have a chance to be heard if you want it." [FN95] It went on to emphasize that it would welcome any submission on behalf of KPMG and that KPMG could "make whatever reservation of rights [it wished] in submitting." [FN96]

FN95. Tr., May 10, 2006, at 426:24-427:2.

FN96. *Id.* at 427:15-430:23.

KPMG ultimately submitted a memorandum of law. It did not seek to offer any evidence, to question any witnesses, or to make any offer of proof.

Ultimate Factual Conclusions

Several broad conclusions follow from the foregoing.

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First, the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with the USAO. As a direct result of the threat to the firm inherent in the Thompson Memorandum, it sought an indication from the USAO that payment of fees in accordance with its settled practice would not be held against it.

Second, the USAO did not give KPMG the comfort it sought. To the contrary, it deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum. It placed the issue of payment of legal fees high on its agenda for its first meeting with KPMG counsel, which emphasized the prosecutors' concern with the issue. Mr. Weddle raised the issue and then repeatedly focused on KPMG's "obligations," thus clearly*353 implying-consistent with the language of the Thompson Memorandum-that compliance with legal obligations would be countenanced, but that anything more than compliance with demonstrable legal obligations could be held against the firm. Ms. Neiman's statement, in response to a comment about payment of legal fees by KPMG, that misconduct should not be rewarded quite reasonably was understood in the same vein, whatever its intent. And Mr. Weddle's colorful warning that the USAO would look at any discretionary payment of fees by KPMG "under a microscope" drove the point home.

Third, the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys. This objective arguably is inherent, to some degree, in the Thompson Memorandum itself. But there is considerably more proof, specific to this case, here. The *contretemps* with KPMG over its Advisory Memorandum demonstrated the government's desire, wherever possible, to interview KPMG witnesses without their being represented by lawyers. The USAO's ready acceptance of KPMG's offer to cut off payment of legal fees for anyone who was indicted speaks for itself. It speaks even more eloquently when one considers that the USAO accepted KPMG's assurance that it had no legal obligation to pay legal fees, knowing that (1) KPMG's "common practice" had been to make such payments, (2) KPMG was extremely anxious to curry favor with the USAO by demonstrating how cooperative it could be, and (3) KPMG had an obvious conflict of interest with its present and former personnel on the question whether it had a legal obligation to pay fees. Had the government been less concerned with punishing those it deemed culpable right from the outset, it would not have accepted KPMG's word on this point.

Fourth, KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO. Absent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and employees both prior to and after indictment, without regard to cost.[FN97]

FN97. In a brief on another motion, filed after this one was taken under submission, the government points to the Statement of Facts attached to the DPA as evidence that KPMG made the decision concerning legal fees "on its own initiative" and argues that "this decision [w]as one reached by the firm for its own reasons, not at the request or direction of the Government." Docket item 569, at 15 n. 5. Even if one put aside the fact that the government failed to offer this in evidence or make this argument on the present motion, the argument would be without merit. There is no inconsistency between KPMG making the decision "for its own reasons" and the decision having been a product of government pressure. The government pressure in fact was the reason that KPMG made the decision.

Discussion

I. The Relationship Between KPMG and its Personnel With Respect to Advancement of Legal

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Fees and Defense Costs

A. Indemnification and Advancement Generally

The issue of employer payment of legal expenses incurred by their employees as a result of doing their jobs arises in a context that dates back many years.

In the nineteenth century, Justice Story stated what already was an established proposition: "if an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, or in following the instructions *354 of his principal, he will be entitled to full compensation therefor" from the employer.[FN98] The modern common law rule is the same. And it extends to payment of expenses incurred by an employee or other agent in defending a lawsuit on a claim with respect to which the employee is entitled to indemnity.[FN99]

FN98. JOSEPH STORY, STORY ON AGENCY § 339, at 413 (Charles P. Greenough ed. 1882).

FN99. *E.g.*,RESTATEMENT (SECOND) OF AGENCY § 438(2) & cmt. e (1958).

The success of the corporation as a business form brought growing pains. Lawsuits against corporate directors became ever more common. By the early part of the last century, the situation had become what one commentator described as "open season on directors." [FN100] The question whether directors who successfully defended such suits were entitled to be reimbursed for the expenses of defending such suits despite the fact that they often were not employees began to arise.

FN100. Joseph W. Bishop, Jr., *Current Status of Corporate Directors' Right to Indemnification,* 69 HARV. . 1057, 1058 (1956) (hereinafter "Bishop").

At least one early decision favored reimbursement, commonly called indemnification.[FN101] In the 1930s, however, courts in Ohio and New York came to the opposite conclusion.[FN102] These decisions gave rise to a "not unnatural cry for legislation." [FN103] Taking the view that " [i]ndemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion [as a result of] ... litigation that results by reason of that service," [FN104] legislatures all over the country responded.

FN101. *Figge v. Bergenthal,* 130 Wis. 594, 109 N.W. 581 (1906).

FN102. *New York Dock Co. v. McCollom,* 173 Misc. 106, 16 N.Y.S.2d 844 (Sup.Ct. Onondaga Co.1939); *Griesse v. Lang,* 37 Ohio App. 553, 175 N.E. 222 (1931).

FN103. Bishop, 69 HARV. . at 1068-69; *accord,* 2 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.20, Reporter's Note 1, at 278 (1994) (hereinafter "ALI"); *see also Baker v. Health Mgmt. Sys., Inc.,* 98 N.Y.2d 80, 85, 745 N.Y.S.2d 741, 744, 772 N.E.2d 1099 (2002) (New York corporate indemnification statute enacted to overrule *New York Dock*).

FN104. *Homestore, Inc.,* 888 A.2d at 211.

Today, all states have statutes addressing the indemnification of corporate directors, officers, employees, and other agents.[FN105] Many have adopted also statutes providing for indemnification of members and employees of partnerships as well as of members, officers, and agents of newer forms of business organization such as limited partnerships and limited liability companies.[FN106] Still others also protect employees with statutes relating specifically to the employment relationship. [FN107]

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FN105. 3A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1344.10 (2002 rev. vol.) (hereinafter "FLETCHER").

FN106. There has been a parallel development with respect to indemnification of public officials and employees. As *New York Dock* pointed out, liability for suits and legal expenses incurred in their defense originally was a risk of assuming public office. 173 Misc. at 111, 16 N.Y.S.2d at 849. New York and doubtless other states have enacted statutes addressing the subject of indemnification for public officers and employees. *E.g.*,N.Y. PUB. OFFICERS L. §§ 17-18 (McKinney 2001); *see*N.Y. LEGISLATIVE ANNUAL 158-59 (1981).

FN107. *See, e.g.*,CALIF. § 2802.

These statutes take different forms. Some require indemnification. Some permit indemnification where the corporation or other business entity elects to provide it.[FN108] A few provide the exclusive vehicle ***355** for indemnification while most permit indemnification as a matter of contract or otherwise as well as pursuant to statute.[FN109] Many provide for indemnification, at least in some circumstances, for the cost of defending employment-related criminal charges.[FN110] All or virtually all, however, share an additional characteristic. As the Delaware Supreme Court recently put it, "the right to indemnification cannot be established ... until after the defense to legal proceedings has been ' successful on the merits or otherwise.' " [FN111]

FN108. *See*3A FLETCHER § 1344.10, at 556-57.

FN109. ALI § 7.20, Reporter's Note 3, at 279.

FN110. *See, e.g.*, 8 WEST'S DEL.CODE ANN. § 145(a); ALI § 7.20(a); *see generally* Pamela H. Bucy, *Indemnification of Corporation Executives Who Have Been Convicted of Crimes: An Assessment and Proposal,* 24 IND. L.REV. 279, 288-89 (1991).

FN111. *Homestore, Inc.*, 888 A.2d at 211 (quoting 8 WEST'S DEL. C. ANN. § 145(c)).

This has been viewed as a problem. Persons who are sued can be subjected to "the personal out-of-pocket financial burden of paying the significant ongoing expenses inevitably involved with investigations and legal proceedings." [FN112] In consequence, many states authorize business entities to advance defense costs to their personnel, subject to the recipients' obligation to repay the money in the event it ultimately is determined that they are not entitled to indemnity.[FN113] This has been described as "an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service." [FN114] Advancement "fills the gap ... so the [entity] may shoulder ... interim costs," and its value "is that it is granted or denied while the underlying action is pending." [FN115] As Judge Haight has written, it protects the "ability [of the employee] to mount ... a defense ... by safeguarding his ability to meet his expenses at the time they arise, and to secure counsel on the basis of such an assurance." [FN116]

FN112. *Id.*

FN113. *See, e.g., id.; Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509-10 (Del.Sup.2005); 8 WEST'S DEL. C. ANN. § 145(e); *see generally*3A FLETCHER § 1344.10, at 560-61.

FN114. *Homestore, Inc.*, 888 A.2d at 211.

FN115. *Kaung*, 884 A.2d at 509.

FN116. *United States v. Weissman*, No. S2 94 Crim. 760(CSH), 1997 WL 334966, at *16 (S.D.N.Y. June 16, 1997).

Against this background, we turn to KPMG's

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relationship with the KPMG Defendants.

B. KPMG

[1] The statute that governs KPMG gives it the authority "to indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever." [FN117] This includes the authority to advance defense costs prior to final judgment.[FN118] KPMG had an ***356** unbroken track record of paying the legal expenses of its partners and employees incurred as a result of their jobs, without regard to cost. All of the KPMG Defendants therefore had, at a minimum, every reason to expect that KPMG would pay their legal expenses in connection with the government's investigation and, if they were indicted, defending against any charges that arose out of their employment by KPMG. Indeed, it appears quite possible that all had contractual and other legal rights to indemnification and advancement of defense costs, [FN119] although the Court declines to decide that in this ruling.

FN117. KPMG is a limited liability partnership. Its partnership agreement is governed by the law of Delaware. 6 WEST'S DEL. C. ANN. § 15-106 (2006); K248, ¶ 19.2. The Delaware Revised Uniform Partnership Act provides that "a partnership may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever " subject to such standards and restrictions as are set forth in its partnership agreement. 6 WEST'S DEL. C. ANN. § 15-110 (2006). As the KPMG partnership agreement contains no such standards and restrictions, it is entirely free to indemnify its personnel.

FN118. *See, e.g., Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co. LLC,* 853 A.2d 124, 126 (Del.Ch.2004) ; *Delphi Easter Partners L.P. v. Spectacular Partners, Inc.,* Civ. A. No. 12409, 1993 WL 328079, at *4-*5 (Del. Ch. Aug. 6, 1993).

FN119. All of the defendants save Stein, who has an express contract with KPMG, arguably are protected by a contract, implied in fact from KPMG's uniform past practice and the circumstances of the business, pursuant to which they are entitled to have their defense costs paid by KPMG. *See, e.g., Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey,* 448 F.3d 573, 582 (2d Cir.2006) (New York law); *Manchester Equip. Co., Inc. v. Am. Way Moving & Storage Co., Inc.,* 176 F.Supp.2d 239, 245 (D.Del.2001) (Delaware law); *Cal. Emergency Physicians Med. Group v. Pacificare of Cal.,* 111 Cal.App.4th 1127, 1134, 4 Cal.Rptr.3d 583, 592 (2003) (California law). Stein's contract requires that KPMG retain on his behalf, and with his consent, "appropriate and qualified counsel" at the firm's expense if he is sued and joint representation is inappropriate, both of which are the case here. Ex. 6, ¶ 13. While KPMG argues that this obligation is limited by another provision of the contract, its position is questionable.
Quite apart from any question of contract, most of the KPMG California defendants appear to be entitled under California statutes to advancement of their defense costs.
Defendants Bickham and Larson were California employees, not partners. To the extent the investigation and indictment arose in consequence of that employment, California statutes require KPMG to advance their defense costs and, unless their actions were both unlawful and " believed by them to be unlawful" at the time, to indemnify them. CALIF. LABOR C. § 2802(a) (requirement of indemnification); CALIF. § 2778 (indemnity includes defense costs); *Jacobus v. Krambo Corp.,* 78 Cal.App.4th 1096, 93 Cal.Rptr.2d 425 (2000) (LABOR C. § 2802 requires employer to defend or

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pay defense costs); *Alberts v. Amer. Cas. Co.*, 88 Cal.App.2d 891, 899, 200 P.2d 37, 42-43 (1948) (indemnitee entitled to recover as soon as it becomes liable).
Defendant Hasting, who also was based in California, was a KPMG partner. Nevertheless, he arguably is covered by the same statutes. Hasting was a Class A partner of KPMG from July 1998 through October 2001. Under KPMG's by-laws, Class A partners were not entitled to share in the profit or required to bear a share of any losses of the firm and were ineligible to serve on the board of directors. (K0200, K0207) Thus, the fact that he bore the title "partner" may not be dispositive. *See, e.g., Clackamas Gastroenterology Assocs. v. Wells,* 538 U.S. 440, 446, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003); *Hishon v. King & Spalding,* 467 U.S. 69, 80 n. 2, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (Powell, J., concurring).

II. The Government Violated the Fifth and Sixth Amendments by Causing KPMG to Cut Off Payment of Legal Fees and Other Defense Costs Upon Indictment

A. The Right to Fairness in the Criminal Process

1. Nature of the Right

" 'No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, *eminently fair* and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.' " FN120

FN120. *Douglas v. California,* 372 U.S. 353, 358 n. 2, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (quoting *Coppedge v. United States,* 369 U.S. 438, 449, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962)) (emphasis added).

*357 [2] The Supreme Court long has protected a defendant's right to fairness in the criminal process. It has grounded this protection primarily in the Due Process Clause FN121 as well as more specific provisions of the Bill of Rights, including the Confrontation and Assistance of Counsel Clauses of the Sixth Amendment.FN122 Whatever the textual source, however, the Court consistently has held that criminal defendants are entitled to be treated fairly throughout the process. In everyday language, they are entitled to a fair shake.

FN121. U.S. CONST. amend. V, XIV.

FN122. *Id.* amend. VI.

This concern for the fairness of criminal proceedings runs throughout many of the Court's decisions regarding fair trials and access to the courts. For example, in *Powell v. Alabama,*FN123 in which the Court first held that a defendant in a capital case has the right to the aid of counsel, it reasoned that if a tribunal were "arbitrarily to refuse to hear a party by counsel[,] it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." FN124 In other words, without counsel for the defense, a capital prosecution is presumptively unfair and therefore violates due process. The implied converse is that due process requires fair proceedings.

FN123. 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

FN124. *Id.* at 64, 53 S.Ct. 55.

One aspect of the required fairness protects the autonomy of the criminal defendant. It rests on the common-sense truth that, at the end of the day, it is the defendant "who suffers the consequences if the defense fails." FN125 So proper respect for the individual prevents the government from interfering with the manner in "which the individual wishes to present a defense." FN126 The underlying theme is

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that the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case.

FN125. *Faretta v. California,* 422 U.S. 806, 820, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

FN126. This general rule against government interference with the defense is based on a presumption that the criminal defendant, "after being fully informed, knows his own best interests and does not need them dictated by the State." *Martinez v. Court of Appeal of Cal.,* 528 U.S. 152, 165, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring).

A defendant's right to control the manner and substance of the defense has several aspects. The defendant has the right to represent him-or herself, [FN127] even if such a decision objectively may appear to be unwise.[FN128] A defendant is guaranteed also "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire" [FN129]-in other words, to use his or her own assets to defend the case, free of government regulation. Nor may the government interfere at will with a defendant's choice of counsel, as the Constitution "protect[s] ... the defendant's free choice independent of concern for the objective fairness of the proceedings." [FN130] Similarly, a defendant is generally free, within the procedural constraints that govern trials generally, to adduce evidence without unjustified restrictions *358 [FN131] and may choose which witnesses to present or cross-examine.[FN132] In short, fairness in criminal proceedings requires that the defendant be firmly in the driver's seat, and that the prosecution not be a backseat driver.[FN133]

FN127. *See, e.g., Faretta,* 422 U.S. at 820-21, 95 S.Ct. 2525.

FN128. *See Martinez,* 528 U.S. at 165, 120 S.Ct. 684 (Scalia, J., concurring).

FN129. *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

FN130. *United States v. Panzardi Alvarez,* 816 F.2d 813, 818 (1st Cir.1987) (internal citation and quotation omitted); *see also Wilson v. Mintzes,* 761 F.2d 275, 279 (6th Cir.1985) ("[R]ecognition of the right [to counsel of choice] also reflects constitutional protection of the accused's free choice").
See also United States v. Laura, 607 F.2d 52, 56 (3d Cir.1979) (Higginbotham, J.) (" We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. The differences, all within the range of effective and competent advocacy, may be important in the development of the defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.").

FN131. *See, e.g., Crane v. Kentucky,* 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (error to foreclose defendant's efforts to adduce evidence about the circumstances of his confession; "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing.") (internal citation and quotation omitted).

FN132. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).
This is not to say, of course, that defendants are free of appropriate regulation of such matters as the order of proof, the offering of cumulative evidence,

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and the length of presentations. *See United States v. Gonzalez-Lopez,* --- U.S. ----, 126 S.Ct. 2557, ---- ----, 165 L.Ed.2d 409, 2006 U.S. LEXIS 5165, at *21-22 (June 26, 2006).

FN133. *See also, e.g., Mayer v. City of Chicago,* 404 U.S. 189, 195-96, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (denial of free transcripts to indigent misdemeanor appellants violated due process); *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (due process required that prisoners have an adequate opportunity to present their claims fairly); *cf. Davis v. Alaska,* 415 U.S. 308, 319-20, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (Confrontation Clause required that defendant be permitted to cross-examine witness as to his juvenile criminal record; unfair to "require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records").

The constitutional requirement of fairness in criminal proceedings not only prevents the prosecution from interfering actively with the defense, but also from passively hampering the defendant's efforts. As the Court put it in *California v. Trombetta,*[FN134]

FN134. 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

"Under the Due Process Clause ..., criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence. Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." [FN135]

FN135. *Id.* at 485, 104 S.Ct. 2528 (internal citations omitted).

Hence, the prosecution may not conceal exculpatory evidence or plea agreements with key government witnesses.[FN136] In some instances, it may be required to disclose*359 the identity of its undercover informants in possession of evidence critical to the defense.[FN137]

FN136. *See Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (prosecution has a constitutional duty to provide defendant with exculpatory evidence that would raise a reasonable doubt as to guilt).

FN137. *See Roviaro v. United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

Prosecutors are required also by the Due Process Clause to conduct themselves fairly. They may not delay intentionally indictments to prejudice defendants.[FN138] They may not obstruct defendants' access to a potential witness unless that is necessary to protect the witness's safety.[FN139] Nor may they knowingly offer perjured or false evidence.[FN140] Entrapment by prosecutors and law enforcement officers is proscribed by the Due Process Clause.[FN141] While prosecutors appropriately are given great latitude in the arguments they make to juries, they cross into unconstitutional territory when they "infect[ ] the trial with unfairness." [FN142]

FN138. *See, e.g., United States v. Lovasco,* 431 U.S. 783, 795 n. 17, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Marion,* 404 U.S. 307, 324, 92 S.Ct. 455,

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30 L.Ed.2d 468 (1971).

FN139. See *United States v. Gonzales,* 164 F.3d 1285, 1292 (10th Cir.1999) (defendants have "a right to be free from prosecution interference with a witness' freedom of choice about whether to talk to the defense"); *Int'l Bus. Mach. Corp. v. Edelstein,* 526 F.2d 37, 44 (2d Cir.1975) (supporting "wholeheartedly" the conclusion that "constitutional notions of fair play and due process dictate that defense counsel be free from obstruction, whether it come from the prosecutor in the case or from a state official or another state acting under color of law") (*quoting Coppolino v. Helpern,* 266 F.Supp. 930 (S.D.N.Y.1967)); *Gregory v. United States,* 369 F.2d 185, 188 (D.C.Cir.1966) (defendant denied a fair trial where prosecutor advised witnesses to the alleged crime not to speak to defense counsel outside the prosecutor's presence); *see also United States v. Muirs,* 145 Fed.Appx. 208, 209 (9th Cir.2005) (" [G]overnment interference with defense access to witnesses implicates due process. ");.

FN140. *See, e.g., Briscoe v. LaHue,* 460 U.S. 325, 327 n. 1, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Agurs,* 427 U.S. at 103 & nn. 8-9, 96 S.Ct. 2392; *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Pyle v. Kansas,* 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935).

FN141. *See, e.g., Cox v. Louisiana,* 379 U.S. 559, 571, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); *Raley v. Ohio,* 360 U.S. 423, 426, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).

FN142. *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)).

Finally, the requirement of fairness in criminal proceedings applies to the structure and conduct of the entire criminal justice system. For example, the Court held that Dr. Sam Sheppard's due process rights were violated when the trial court failed to protect him from the firestorm of prejudicial publicity surrounding his trial.[FN143] It has recognized also the right to trial before an unbiased tribunal. In *Ward v. Village of Monroeville,*[FN144] for example, it held that a defendant was denied due process when he was tried for traffic offenses before the village mayor, who was responsible for village finances and whose court provided a substantial portion of village funds through fines, forfeitures, costs, and fees. Similarly, in *Tumey v. Ohio,*[FN145] the Court reversed a conviction because the judge was paid from fines levied in his court and therefore received payment only upon conviction. The Court said that such a system "deprives a defendant ... of due ***360** process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." [FN146]

FN143. *See Sheppard v. Maxwell,* 384 U.S. 333, 362-63, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

FN144. 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972).

FN145. 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

FN146. *Id.* at 524, 47 S.Ct. 437; *see also Bracy v. Gramley,* 520 U.S. 899, 904-05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (" The Due Process Clause clearly requires a "fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." ") (internal citations and quotation marks omitted); *Johnson v. Mississippi,* 403 U.S. 212, 215-216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) (due process violated

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where judge presided over a case in which one of the defendants was a previously successful litigant against him); *In re Murchison,* 349 U.S. 133, 137-139, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (due process violated by a judge presiding over a criminal trial of a defendant who he had indicted under the state's one-man grand jury procedure).

The Court's jurisprudence thus makes clear that defendants have the right, under the Due Process Clause, to fundamental fairness throughout the criminal process.

2. The Right to Fairness in the Criminal Process Is a Fundamental Liberty Interest Entitled to Substantive Due Process Protection Where, As Here, the Government Coerces a Third Party to Withhold Funds Lawfully Available to a Criminal Defendant

[3] The Due Process Clause has been interpreted to provide not only procedural protection for deprivations of life, liberty, and property, but also substantive protection for fundamental rights-those that are so essential to individual liberty that they cannot be infringed by the government unless the infringement is narrowly tailored to serve a compelling state interest.[FN147]

FN147. *See, e.g., Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

"Only fundamental rights and liberties which are deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty qualify for such protection." [FN148] The right to fairness in criminal proceedings has not been explicitly so characterized by the Court.[FN149] The question here, then, is whether and to what extent it properly is regarded as fundamental for purposes of requiring strict scrutiny of alleged impingements. A number of guides point the way.

FN148. *Chavez v. Martinez,* 538 U.S. 760, 775, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (internal citations omitted).

FN149. The rights thus far explicitly characterized by the Supreme Court as fundamental in this specialized sense fall into five rough categories: the rights to freedom of association, to vote and participate in the electoral process, to travel interstate, to fairness in procedures concerning individual claims against governmental deprivation of life, liberty, or property, and to privacy relating to freedom of choice in matters relating to an individual's personal life. *See*2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7 (1999) (" ROTUNDA & NOWAK").

To begin with, many of the Supreme Court's criminal due process decisions described above can be understood in modern terms most readily in the substantive due process and strict scrutiny framework. The requirement of an unbiased tribunal, for example, is not found in the explicit language of the Constitution. It rests instead on the proposition that a fair tribunal is "implicit in the concept of ordered liberty." [FN150] The state's legitimate interest in, for example, saving money by having the same person both run a town's finances and levy traffic fines is insufficient to justify infringing upon the right to a fair ***361** trial. Thus, the Supreme Court's repeated recognition of the constitutional mandate of fairness in criminal proceedings strongly suggests that this right is " fundamental" for substantive due process purposes, at least in some circumstances. Indeed, it would be difficult to conclude otherwise. Our concern with protection of the individual against the unfair use of the great power of the government is "deeply rooted in this Nation's history and tradition." [FN151] " [N]either liberty nor justice would exist" if fairness to criminal defendants were sacrificed.[FN152] Indeed, as one court put it, "What can be more basic to the scheme of constitutional rights precious to us all than the right to fairness throughout the

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proceedings in a criminal case?" [FN153]

FN150. *Glucksberg,* 521 U.S. at 721, 117 S.Ct. 2258 (internal citations and quotations omitted).

FN151. *Moore v. City of East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion).

FN152. *Glucksberg,* 521 U.S. at 721, 117 S.Ct. 2258 (internal citations and quotations omitted).

FN153. *United States v. Curran,* 724 F.Supp. 1239, 1241 (C.D.Ill.1989), *rev'd on other grounds, United States v. Spears,* 965 F.2d 262 (7th Cir.1992), *cert. denied,* 506 U.S. 989, 113 S.Ct. 502, 121 L.Ed.2d 438 (1992).

These considerations have led the Second Circuit [FN154] and several other courts (often in *dicta*), [FN155] as well as respected commentators, [FN156] to conclude that the right to fairness in criminal proceedings is a fundamental liberty interest subject to substantive due process protection. But it is not necessary or, in this Court's view, appropriate, to go that far in order to decide this case. It is a venerable maxim of constitutional construction that courts should decide no more than is necessary. [FN157] And the only question now before the Court is whether a criminal defendant has a right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference.[FN158] Given all that ***362** has been said above, this Court concludes that such a right is basic to our concepts of justice and fair play. It is fundamental.[FN159]

FN154. *See Quill v. Vacco,* 80 F.3d 716, 724 (2d Cir.1996) (recognizing the right to fairness in a criminal proceeding as a fundamental liberty interest subject to substantive due process analysis), *rev'd on other grounds,*521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997).

FN155. *See, e.g., Doe v. Taylor Independent Sch. Dist.,* 15 F.3d 443, 479 n. 6 (5th Cir.1994) (dissenting opinion) (" right to fair criminal process"); *Ryder v. Freeman,* 918 F.Supp. 157, 161 (W.D.N.C.1996) ("fundamental fairness in the criminal process"); *Boyd v. Bulala,* 647 F.Supp. 781, 787 (W.D.Va.1986) (" right to fairness in the criminal process"), *rev'd in part on other grounds,*877 F.2d 1191 (4th Cir.1989); *Grant v. City of Chicago,* 594 F.Supp. 1441, 1450 (D.C.Ill.1984) ("[a]ccess to the complete criminal process"); *cf. Provident Mut. Life Ins. Co. of Philadelphia v. City of Atlanta,* 864 F.Supp. 1274, 1291 (N.D.Ga.1994) (noting in equal protection analysis "the right to fairness in the criminal process").

FN156. *See* 2 ROTUNDA & NOWAK§ 15.7 (right to fairness in criminal process implicitly recognized by the Court as fundamental); *see also, e.g.,* Gregory F. Intoccia, *Constitutionality of the Death Penalty Under the Uniform Code of Military Justice,* 32 A.F. L.REV. 395, 399 (1990) ("The Court views the right to fairness in the criminal process as fundamental and deserving of significant judicial protection."). *Cf.* Brad Snyder, *Disparate Impact on Death Row: M.L.B. and the Indigent's Right to Counsel at Capital State Postconviction Proceedings,* 107 YALE L.J. 2211, 2215 ("The two most frequently recognized fundamental equal protection rights are the right to vote and participate in elections and the right of access to the criminal process.").

FN157. *See, e.g., Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 341, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

FN158. Indigent criminal defendants are entitled to competent defense representation. Serious questions have been raised about whether the means

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available for providing quality defenses for indigents are sufficient to accomplish that goal. *See, e.g., New York County Lawyers' Ass'n v. New York,* 196 Misc.2d 761, 763, 763 N.Y.S.2d 397, 399 (2003) (granting declaratory relief increasing the hourly compensation for counsel assigned to represent indigents in New York State criminal cases after finding that the state had "ignore[d] its constitutional obligation to the poor by failing to increase the assigned counsel rates, [resulting] in many cases, in the denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation"). If these criticisms are well-founded, remedial measures are not only desirable, but constitutionally may be required. But that is a question for another day.

FN159. It is crucial to note that the Court deals here with extrajudicial action by the government that deliberately or recklessly tilts the playing field against a criminal defendant. Such actions have nothing in common with fair and neutral regulation of, for example, the conduct of a criminal trial, which naturally are not subjected to strict scrutiny.

3. The Government's Actions Violated the Substantive Due Process Right to Fairness in the Criminal Process

a. The Effect on the KPMG Defendants

[4] The Thompson Memorandum and the USAO pressure on KPMG to deny or cut off defendants' attorneys' fees necessarily impinge upon the KPMG Defendants' ability to defend themselves.

This is by no means a garden-variety criminal case. It has been described as the largest tax fraud case in United States history. The government thus far has produced in discovery, in electronic or paper form, at least 5 million to 6 million pages of documents *plus* transcripts of 335 depositions and 195 income tax returns.[FN160] The briefs on pretrial motions passed the 1,000-page mark some time ago.[FN161] The government expects its case in chief to last three months, while defendants expect theirs to be lengthy as well.[FN162] To prepare for and try a case of such length requires substantial resources.[FN163] Yet the government has interfered with the ability of the KPMG Defendants to obtain resources they otherwise would have had. Unless remedied, this interference almost certainly will affect what these defendants can afford to permit their counsel to do. This would impact the defendants' ability to present the defense they wish to present by limiting the means lawfully available to them. The Thompson Memorandum and the USAO's actions therefore are subject to strict scrutiny.

FN160. Anderson Decl. [docket item 561] ¶¶ 24, 27, 38-39, 41.

FN161. Tr., Mar. 30, 2006, at 9:10-14.

FN162. *See, e.g., United States v. Stein,* 428 F.Supp.2d 138 (S.D.N.Y.2006).

FN163. If one were to assume a six-month trial of 117 days and that a defendant were represented by a single lawyer, who devoted eight hours for each trial day, the cost at $400 per hour simply to attend the trial would be almost $375,000, without taking into account such other expenses as transcripts, copying, travel expenses, and the like. That figure, moreover, would be misleadingly low, as it is difficult to imagine that this case could be defended competently without spending as much time reviewing at least some of the 5 to 6 million pages of documents produced by the government and otherwise preparing as in attending the trial. It therefore is quite reasonable to assume that even a minimal defense of this case could well cost $500,000 to $1 million, if not significantly more.

b. The Thompson Memorandum and the USAO's

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Actions Fail the Strict Scrutiny Test

[5] To survive strict scrutiny, government action must be narrowly tailored to achieve a compelling government interest.[FN164]

FN164. *See, e.g., Glucksberg,* 521 U.S. at 721, 117 S.Ct. 2258 (internal citations and quotations omitted).

***363** The portion of the Thompson Memorandum at issue here-the language that states that payment of legal fees for employees and former employees may be viewed as protection of culpable employees and thus cut in favor of indicting the entity-purportedly serves three goals. First, it is intended to facilitate just charging decisions concerning business entities by focusing on a consideration pertinent to gauging their degrees of cooperation. Second, it seeks to strengthen the government's ability to investigate and prosecute corporate crime by encouraging companies to pressure their employees to aid the government-recall Mr. Weddle's urging KPMG to tell its people to be "totally open" with the USAO, " even if that [meant admitting] criminal wrongdoing." Finally, it seeks to punish those whom prosecutors deem culpable-it attempts to justify depriving employees of corporate aid by characterizing it as " protecting ... culpable employees and agents."

The final justification may be disposed of quickly. The job of prosecutors is to make the government's best case to a jury and to let the jury decide guilt or innocence. Punishment is imposed by judges subject to statute. The imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate governmental interest-it is an abuse of power. The government's other points, however, are far more substantial.

Any government's interest in investigating and fairly prosecuting crime is compelling. The consequences for civilization of another government's failure to accomplish that basic end are on view on the evening news every day.

In order properly to accomplish that task, the government must have the ability to make just charging decisions and to prevent obstruction of its investigations. Hence, no one disputes the proposition that a willingness to cooperate with the government is an appropriate consideration in deciding whether to charge an entity. Nor does anyone suggest that an entity's obstruction of a government investigation-what the government has called "circling the wagons" [FN165]-should be ignored in a charging decision. Many remember the Watergate case, in which the legal fees of individuals who broke into the offices of the Democratic National Committee were paid, along with other "hush money," to buy the silence of the burglars and to protect higher-ups.[FN166] Corporate equivalents no doubt occur. But the devil, as always, is in the details.

FN165. Tr. (Neiman) 292:21-293:22; *see also* Tr. 409:20-25.

FN166. *See United States v. Haldeman,* 559 F.2d 31, 55-57 (D.C.Cir.1976), *cert. denied,*433 U.S. 916, 97 S.Ct. 2992, 53 L.Ed.2d 1103 (1977). *See also, e.g., United States v. Locascio,* 6 F.3d 924, 931-34 (2d Cir.1993) (organized crime figure's payment of legal fees for crime family members appropriate proof of criminal enterprise).

The first difficulty is that the Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment *only if* it is used as a means to obstruct an investigation. Indeed, the text strongly suggests that advancement of defenses costs weighs against an organization independent of whether there is any "circling of the wagons." [FN167]

FN167. The Thompson Memorandum's assessment of whether a company is cooperating includes an examination of whether "the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation." Thompson Memo at VI(A). The payment of legal

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> fees is treated in a separate paragraph that focuses entirely on "whether the corporation appears to be protecting its culpable employees and agents." *Id.* at VI(B).

***364** The USAO, possibly concerned with the breadth of the Thompson Memorandum, seeks to deal with this by asserting that, in practice, it considers the payment of legal fees as a negative factor only when payments are used to impede.[FN168] Perhaps so. But whatever the government may do in the privacy of U.S. Attorneys' offices and in the DOJ's Criminal Division is not what defense lawyers see. They see the Thompson Memorandum. Few if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the language of the Thompson Memorandum itself. It would be irresponsible to take the chance that prosecutors might view it as "protecting ... culpable employees and agents." As KPMG's new chief legal officer, former U.S. District Judge Sven Erik Holmes, testified, he thought it indispensable (as would any defense lawyer) "to be able to say at the right time with the right audience, we're in full compliance with the Thompson Memorandum."[FN169]

> FN168. Tr. 409:20-25.

> FN169. Docket item 544, Ex. B, at 74-75.

The bottom line is plain enough. If the government means to take the payment of legal fees into account in making charging decisions only where the payments are part of an obstruction scheme-and thereby narrowly tailor its means to its ends-it would be easy enough to say so. But that is not what the Thompson Memorandum says.

The concerns do not end here. The argument that payment of legal fees to employees and former employees is relevant to gauging the extent of a company's cooperation also is problematic. There is no necessary inconsistency between an entity cooperating with the government and, at the same time, paying defense costs of individual employees and former employees. An entity may pay out of a judgment that extending this benefit will aid it in keeping and hiring competent and honest employees. It may pay in recognition that an employee caught up in an investigation, or even charged with a crime, because the employee did his or her job for the company has at least some claim to assistance, even in the absence of a legal right. In either case, however, a company may pay at the same time that it does its best to bare its corporate soul, stands at the government's beck and call to provide information and witnesses, and does a myriad of other things to aid the government and clean the corporate house. So it simply cannot be said that payment of legal fees for the benefit of employees and former employees necessarily or even usually is indicative of an unwillingness to cooperate fully. This is especially unlikely after employees have been indicted and fired, as is the situation here.

For these reasons, this aspect of the Thompson Memorandum is not narrowly tailored to achieve a compelling objective. It discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. It does so in the face of state indemnification statutes that expressly permit businesses entities to provide those means because the states have determined that legitimate public interests may be served. It does so even where companies obstruct nothing and, to the contrary, do everything within their power to make a clean breast of the facts to the government and to take responsibility for any offenses they may have committed. It therefore burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs and, accordingly, fails strict ***365** scrutiny. The legal fee advancement provision violates the Due Process Clause.[FN170]

> FN170. It makes no difference that the Thompson Memorandum is a policy of the DOJ and implemented by the USAO rather than legislation enacted by Congress. Due process requires that government action "

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> through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' " *DuBose v. Kelly,* 187 F.3d 999, 1004 (8th Cir.1999) (quoting *Buchalter v. New York,* 319 U.S. 427, 429, 63 S.Ct. 1129, 87 L.Ed. 1492(1943)). The government cannot avoid strict scrutiny of actions that impinge upon the fundamental right of fairness in the criminal process simply by acting through DOJ policy rather than by statute or formal regulation. *See, e.g., Nicholson v. Williams,* 203 F.Supp.2d 153, 243 (E.D.N.Y.2002) ("In considering the constitutionality of the policy or practice of a state agency rather than the specific acts of individual officers, it is appropriate to apply the higher standard and stricter analysis that is applied to legislation.").

c. The Actions of the USAO

The actions of the USAO in this case compounded the problem that the Thompson Memorandum created.

[6] The Thompson Memorandum says that the payment of legal fees (beyond any legal obligation) may be held against a business entity if the government views the payments as protection of " culpable employees" or as evidence of a lack of full and complete cooperation. The USAO took advantage of that uncertainty by emphasizing the threat.

Within days of receiving the criminal referral on February 5, 2004, the USAO put the payment of employee legal fees near the top of the government's agenda for the very first meeting with KPMG's lawyers. On February 25, 2004, Mr. Bennett reported that KPMG had cleaned house and pledged full cooperation with the government. But Mr. Weddle immediately raised the legal fee issue. When Mr. Bennett sought to elicit the USAO's view on that subject, the response was a reference to the Thompson Memorandum. This was followed later in the meeting by Ms. Neiman's statement, on the heels of a reference to payment of employee legal expenses, that misconduct should not be rewarded and Mr. Weddle's threat that the government would look at the payment of legal fees that KPMG was not legally obliged to pay "under a microscope." And it did all this despite the fact that it does not claim that KPMG obstructed its investigation, least of all by using the payment of legal fees to prevent employees or former employees from talking to the government or telling it the truth.

The individual prosecutors in the USAO acted pursuant to the established policy of the DOJ as expressed in the Thompson Memorandum. They understood, however, that the threat inherent in the Thompson Memorandum, coupled with their own reinforcement of that threat, was likely to produce exactly the result that occurred-KPMG's determination to cut off the payment of legal fees for any employees or former employees who were indicted and to limit and condition their payment during the investigative stage. Their actions cannot withstand strict scrutiny under the Due Process Clause because they too were not narrowly tailored to serving compelling governmental interests.

B. The Sixth Amendment Right to Counsel

1. The Nature and Scope of the Right to Counsel

Quite apart from the due process analysis, the KPMG Defendants argue that the Thompson Memorandum and its implementation by the government infringed ***366** their Sixth Amendment right to counsel. They are correct.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." [FN171] As already has been demonstrated, however, this guarantees more than the mere presence of a lawyer at a criminal trial. It protects, among other things, an individual's right to choose the lawyer or lawyers he or she desires [FN172] and to use one's own funds to mount the defense that one wishes to present.[FN173]

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Moreover, a defendant's exercise of his Sixth Amendment right to counsel is not to be feared or avoided by the government:

> FN171. U.S. CONST. amend. VI.
>
> FN172. *See, e.g., Wheat,* 486 U.S. at 164, 108 S.Ct. 1692.
>
> FN173. *Caplin & Drysdale, Chartered,* 491 U.S. at 624, 109 S.Ct. 2646.

"No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system." FN174

> FN174. *Escobedo v. Illinois,* 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

The government nevertheless argues that the KPMG Defendants have no Sixth Amendment rights at stake here for two principal reasons.

a. Attachment of Sixth Amendment Rights

[7] The government first argues that the Sixth Amendment right to counsel attaches only upon the initiation of a criminal proceeding. As the Thompson Memorandum was adopted and the USAO did its handiwork before the KPMG Defendants were indicted, it contends, there was no Sixth Amendment violation.

It is true, of course, that the Sixth Amendment right to counsel typically attaches at the initiation of adversarial proceedings-at an arraignment, indictment, preliminary hearing, and so on.FN175 But the analysis can not end there. The Thompson Memorandum on its face and the USAO's actions were parts of an effort to limit defendants' access to funds for their defense. Even if this was not among the conscious motives, the Memorandum was adopted and the USAO acted in circumstances in which that result was known to be exceptionally likely. The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment.FN176

> FN175. *See Kirby v. Illinois,* 406 U.S. 682, 689-90, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); *see also, e.g., United States v. Ash,* 413 U.S. 300, 303 n. 3, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973).
>
> FN176. *Cf. United States v. Harrison,* 213 F.3d 1206, 1207 (9th Cir.2000) (holding that ongoing pre-indictment attorney-client relationship, of which the government was aware, invoked the Sixth Amendment as a matter of law upon indictment).

The government argues that this conclusion will open the door for future defendants to argue that all sorts of pre-indictment actions violate the Sixth Amendment and thus hamstring every investigation and prosecution. This is singularly unpersuasive. The government here acted with the purpose of minimizing these defendants' access to resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely *367 result of its actions. In these circumstances, it is not unfair to hold it accountable.

b. "Other People's Money"

[8] The government next argues that the KPMG Defendants have no right, under the Sixth Amendment or otherwise, to spend "other people's money" on expensive defense counsel. The rhetoric is appealing, but the characterization of the issue-and therefore the conclusion-are wrong.

The argument is based on *Caplin & Drysdale, Chartered v. United States*FN177 and *United States v. Monsanto,*FN178 which held that the Sixth Amendment does not creates a right for those in

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possession of property forfeitable to the United States to spend that money on their legal defense. That is hardly surprising-the money belongs to the government. But that is not the issue here.

FN177. 491 U.S. at 619, 109 S.Ct. 2646.

FN178. 491 U.S. 600, 602, 109 S.Ct. 2657, 105 L.Ed.2d 512 (1989).

Caplin & Drysdale recognized that the Sixth Amendment does protect a defendant's right to spend his own money on a defense.[FN179] Here, the KPMG Defendants had at least an expectation that their expenses in defending any claims or charges brought against them by reason of their employment by KPMG would be paid by the firm. The law protects such interests against unjustified and improper interference.[FN180] Thus, both the expectation and any benefits that would have flowed from that expectation-the legal fees at issue now-were, in every material sense, their property, not that of a third party. The government's contention that the defendants seek to spend "other people's money" is thus incorrect.

FN179. 491 U.S. at 624, 109 S.Ct. 2646.

FN180. The torts of interference with prospective economic advantage and inducement of breach of contract are well known. *See generally Kirch v. Liberty Media Corp.,* 449 F.3d 388, 399-400 (2d Cir.2006); *Israel v. Wood Dolson Co.,* 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956). Interference with prospective economic advantage covers interference with the ability to pursue legal remedies against another party. *See, e.g., Reilly v. Natwest Mkts. Group, Inc.,* 178 F.Supp.2d 420, 429 (S.D.N.Y.2001); *Ripepe v. Crown Equip. Corp.,* 293 A.D.2d 462, 463, 741 N.Y.S.2d 64, 66 (2d Dept.2002); *Curran v. Auto Lab Svc. Ctr., Inc.,* 280 A.D.2d 636, 637, 721 N.Y.S.2d 662, 663 (2d Dept.2001).

2. The Thompson Memorandum and the Government's Implementation Violated the KPMG Defendants' Sixth Amendment Right to Counsel

[9] The KPMG Defendants have established that the government's implementation of the Thompson Memorandum impinged on their Sixth Amendment rights to counsel and to present a complete defense. Interference with these rights is improper if the government's actions are "wrongfully motivated or without adequate justification." [FN181]The remaining question, then, is whether justification exists.

FN181. *Via v. Cliff,* 470 F.2d 271, 274-75 (3d Cir.1972); *accord, United States v. Morrison,* 602 F.2d 529, 531 (3d Cir.1979) , *rev'd on other grounds,*449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981).

There is not much case law on the standard to be applied in making this determination. In comparable circumstances, federal courts often have looked to the common law of torts to "enrich the [federal] jurisprudence" [FN182] and to provide " an ***368** appropriate starting point," [FN183] always keeping in mind that we do so to inform our construction of the Constitution, not to apply state tort law.[FN184]

FN182. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 231-32, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (Brennan, J., concurring and dissenting) ("[W]here the wrong under [Section] 1983 is closely analogous to a wrong recognized in the law of torts, it is appropriate for the federal court to apply the relevant tort doctrines ...").

FN183. *Carey v. Piphus,* 435 U.S. 247, 257-58, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); *see also, e.g., Wilson v. Garcia,* 471 U.S. 261, 277, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) ("[W]e have found tort analogies compelling in establishing the elements of a cause of action under §

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1983 ... and in identifying the immunities available to defendants.") *superceded by statute on other grounds as recognized in Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004); *Smith v. Wade,* 461 U.S. 30, 34, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983) ("In the absence of more specific guidance, we looked first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of [Section 1983]."); *Imbler v. Pachtman,* 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (" [Section] 1983 is to be read in harmony with general principles of tort immunities and defenses, rather than in derogation of them."); *Pierson v. Ray,* 386 U.S. 547, 556, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) ("[Section] 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.") (internal quotation marks omitted); *Singer v. Fulton County Sheriff,* 63 F.3d 110, 118 (2d Cir.1995), *cert. denied,*517 U.S. 1189, 116 S.Ct. 1676, 134 L.Ed.2d 779 (1996); *Cook v. Sheldon,* 41 F.3d 73, 79 (2d Cir.1994) (borrowing the elements for a claim of malicious prosecution under Section 1983 from state tort law); *Raysor v. Port Authority of New York and New Jersey,* 768 F.2d 34, 39-40 (2d Cir.1985), *cert. denied,*475 U.S. 1027, 106 S.Ct. 1227, 89 L.Ed.2d 337 (1986); *All Aire Conditioning v. City of New York,* 979 F.Supp. 1010, 1020 n. 47 (S.D.N.Y.1997), *aff'd,*166 F.3d 1199, 1998 WL 907230 (1998); *C.A.U.T.I.O.N., Ltd. v. City of New York,* 898 F.Supp. 1065, 1072 (S.D.N.Y.1995).

FN184. *Monroe v. Pape,* 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

The common law tort of interference with prospective economic advantage necessarily deals with the issue whether a private actor is justified in interfering in the economic relations of another. In assessing claims of justification in private settings, courts look to a series of factors including the relative importance of the interests served by the plaintiff and the defendant.[FN185] Making appropriate adjustments for the fact that this analysis involves the public sector, the dispositive question is whether the government's law enforcement interests in taking the specific actions in question sufficiently outweigh the interests of the KPMG Defendants in having the resources needed to defend as they think proper against these charges.

FN185. *See, e.g.,*RESTATEMENT (SECOND) OF TORTS § 767 (1979).

Our nation made a deliberate choice more than two centuries ago. We determined that a person charged with a crime has "the right in an adversary criminal trial to make a defense as we know it." [FN186] That choice rests on the premise that " partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." [FN187]

FN186. *Faretta,* 422 U.S. at 818, 95 S.Ct. 2525.

FN187. *Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

The Thompson Memorandum discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. This is so even where companies obstruct nothing and, to the contrary, do everything within their power to make a clean breast of the facts to the government and to take responsibility for any offenses they may have committed. It undermines the proper functioning of the adversary process that the Constitution adopted as the mode of *369 determining guilt or innocence in criminal cases. The actions of prosecutors who implement it can make matters even worse, as occurred here.

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The Court holds that the fact that advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves, regardless of the legal standard of scrutiny applied.

3. The KPMG Defendants Are Not Obliged to Establish Prejudice, Which in Any Case Would Be Presumed Here

[10] The government argues the KPMG Defendants' motion nevertheless should be denied because they have not shown prejudice under *Strickland v. Washington,*[FN188] which requires a defendant seeking to overturn his or her conviction based on ineffective assistance of counsel to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [FN189] But the government is mistaken.

FN188. 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

FN189. *Id.* at 694, 104 S.Ct. 2052.

This conclusion follows from *United States v. Gonzalez-Lopez,*[FN190] a case involving a deprivation of the defendant's right to counsel of his choice. The Court there held that *Strickland* did not require a showing of prejudice in such a case because:

FN190. --- U.S. ----, 126 S.Ct. 2557, 2559-60, 165 L.Ed.2d 409.

"Deprivation of the right [to counsel of choice] is ' complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice-which is the right to a particular lawyer regardless of comparative effectiveness-with the right to effective counsel-which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." [FN191]

FN191. *Id.* at ----, 126 S.Ct. at 2563-64.

Here, the violation is analogous to that at issue in *Gonzalez-Lopez.* The government has interfered with the KPMG Defendants' right to be represented as they choose, subject to the constraints imposed by the resources lawfully available to them. This violation, like a deprivation of the right to counsel of their choice, is complete irrespective of the quality of the representation they receive. Thus, *Strickland* has no bearing here.[FN192]

FN192. This would have been so even before *Gonzalez-Lopez. Strickland* by its terms applies to "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. Its requirement of a showing that the result of the trial that ended in conviction would have been different but for counsel's substandard performance would have no bearing here in any case, as no trial yet has occurred. Moreover, the requirement that a convicted defendant in an ineffective assistance case demonstrate prejudice stems at least in significant part from the Court's appropriate concern with preserving the finality of convictions and with society's need to "justify reliance on the outcome of the proceeding." *Id.* at 692, 104 S.Ct. 2052 . As there has been no trial yet, the interest in finality is not implicated.

This result is consistent with common sense. Improper government conduct has created a significant risk that the KPMG Defendants' ability to present the defense they choose has been compromised. Corrective action now may well prevent that. ***370** There is, in consequence, a

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countervailing interest in *not* going blindly forward with a lengthy trial, which will consume vast judicial and party resources, without dealing with the issue. No one would set out to drive across a desert with half a tank of gas, knowing that one might run out before reaching the other side, without pausing first to fill up the tank. The prudent course is to avoid the problem at the outset-not to take a chance on being stranded and then having to try to figure out what to do about it.

The approach to cases involving criminal defense counsel burdened by conflicts of interest supports this conclusion. A district court that learns before trial of a possible conflict of interest between a defense attorney and a client is obliged to protect the defendant's Sixth Amendment right to unconflicted legal representation by immediately investigating the conflict and, if necessary, either obtaining a knowing and intelligent waiver from the defendant or disqualifying the conflicted attorney. [FN193] The rationale for doing so is simple. Prejudice is likely in conflict situations, and "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." [FN194] That rationale is fully applicable here.

FN193. *See, e.g., Wheat,* 486 U.S. at 160, 108 S.Ct. 1692; *United States v. Perez,* 325 F.3d 115, 125-26 (2d Cir.2003); *United States v. Schwarz,* 283 F.3d 76, 95-96 (2d Cir.2002); *United States v. Levy,* 25 F.3d 146, 153 (2d Cir.1994); *United States v. Fulton,* 5 F.3d 605, 612-13 (2d Cir.1993); *United States v. Curcio,* 680 F.2d 881, 888-90 (2d Cir.1982); *United States v. Scala,* 432 F.Supp.2d 403, 406-08, 2006 WL 1589772, at *2-4 (S.D.N.Y.2006).

FN194. *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052.

Even if prejudice were relevant at this stage of the proceedings, however, the government's argument still would fail. Although *Strickland* generally requires convicted defendants to demonstrate that the result of the trial probably would have been different but for the ineffective assistance of counsel, this requirement does not apply where a violation resulted in a "structural defect[ ] in the constitution of the trial mechanism" [FN195] that " affected-and contaminated-the entire criminal proceeding." [FN196] In other words, there are two distinct types of constitutional errors: trial errors, which occur during the presentation of evidence at trial, and structural errors, which are overarching and permeate the entire proceeding.[FN197] As trial errors occur during the presentation of a case to the jury, they "may ... be quantitatively assessed in the context of other evidence presented in order to determine whether" their commission "was harmless beyond a reasonable doubt." [FN198] Structural errors, on the other hand, "defy analysis by 'harmless-error' standards." [FN199] They affect "[t]he entire conduct of the trial from beginning to end." [FN200] Prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost." [FN201]

FN195. *Arizona v. Fulminante,* 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

FN196. *Satterwhite v. Texas,* 486 U.S. 249, 257, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); *see also Brecht v. Abrahamson,* 507 U.S. 619, 629-30, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

FN197. *Fulminante,* 499 U.S. at 307-10, 111 S.Ct. 1246.

FN198. *Id.* at 307-08, 111 S.Ct. 1246.

FN199. *Id.* at 309, 111 S.Ct. 1246.

FN200. *Id.* at 310, 111 S.Ct. 1246.

FN201. *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052 (citing *Cronic,* 466 U.S. at 658,

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104 S.Ct. 2039); *accord, Fulminante,* 499 U.S. at 309-10, 111 S.Ct. 1246; *see also Lainfiesta v. Artuz,* 253 F.3d 151, 157 (2d Cir.2001).

***371** Structural defects exist-and prejudice must be presumed-where a defendant is actively or constructively denied counsel at a critical stage of the trial or where defense counsel is burdened by an actual conflict of interest.[FN202] Structural errors " may be present [also] on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." [FN203] In *Powell v. Alabama,* for example, the trial court, on the day of the trial, appointed an attorney from a different state-who professed himself to be unfamiliar with the facts of the case and the local procedure-to represent defendants in a highly publicized capital case. The Supreme Court held that the likelihood that counsel could have performed as an effective advocate in those circumstances was so remote as to render the trial inherently unfair, obviating the requirement that the defendants affirmatively demonstrate prejudice.[FN204]

FN202. *See, e.g., Cronic,* 466 U.S. at 659 & n. 25 & n. 28, 104 S.Ct. 2039; *Fulminante,* 499 U.S. at 309-10, 111 S.Ct. 1246; *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052; *Cuyler v. Sullivan,* 446 U.S. 335, 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

FN203. *Cronic,* 466 U.S. at 659-60, 104 S.Ct. 2039.

FN204. 287 U.S. at 53, 53 S.Ct. 55.

Although the circumstances here differ from those in *Powell,* the government's conduct threatens to contaminate this proceeding. Properly defending this case, in all its complexity, has required, and will continue to require, substantial financial resources. The government has spent years investigating the case, presumably reviewing millions of pages of documents [FN205] and interviewing scores of witnesses if not more. The KPMG Defendants, however, have limited resources. Although each defendant is represented by retained counsel, the government's interference almost inevitably has affected at least some lawyer selections and, equally important, limited what the KPMG Defendants can pay their lawyers to do. At least most of them likely will be unable to afford to pay their attorneys to review all or even most of the documents the government has produced or, perhaps, to interview even a fraction of the witnesses the government has interviewed. They may not be able to afford tax experts to advise trial counsel and, if need be, answer those whom the government may present at trial.

FN205. The government thus far has produced, in electronic or paper form, at least 5 to 6 million pages of documents *plus* transcripts of 335 depositions and 195 income tax returns. Anderson Decl. [docket item 561] ¶ ¶ 24, 27, 38-39, 41.

In these circumstances, demonstrating prejudice after the fact would be all but impossible. In order to show that the trial outcome would have been different had a convicted defendant been able to afford better preparation before trial, the defendant's counsel, after conviction, would have to do the work that the defendant could not afford to have done in the first place. If the defendant could not afford to have the work done in the first place, the defendant certainly could not afford to have it done after conviction. And relying upon the possibility of counsel appointed under the Criminal Justice Act to do so, should a convicted defendant have become indigent, simply would be unrealistic. In any case, assessing the impact of pretrial omissions and errors could require extensive evidentiary proceedings. In consequence, it is ***372** difficult to imagine circumstances in which an error more properly could be said to threaten to taint an entire proceeding.

This conclusion too is supported by *Gonzalez-Lopez.* Speaking of a deprivation of the

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right to counsel of choice, the Supreme Court wrote: "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as " structural error." ' Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of those myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,'-or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." FN206

FN206. --- U.S. at ---- - ----, 126 S.Ct. 2557 (internal citations omitted).

The same reasoning applies here. Virtually everything the defendants do in this case may be influenced by the extent of the resources available to them. There simply would be no way to know, after the fact, whether the outcome had been influenced by limitations improperly placed upon the availability of resources.

Further, the government's interference in the KPMG Defendants' ability to mount a defense "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. " FN207 This injury to the criminal justice system is not dependent on whether or not the KPMG Defendants ultimately are convicted or-more to the point-whether they would have been convicted even if the government had not interfered with their constitutional right to counsel.

FN207. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987); *see also Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (" [J]ustice must satisfy the appearance of justice.").

Accordingly, there is no need for a particularized showing of prejudice here. While a defendant does not have a constitutional right to the most expensive lawyer or to unlimited defense funds, government interference with those resources that a defendant does have or legally may obtain fundamentally alters the structure of the adversary process. As the late Judge Wyzanski explained, although " 'a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.' " FN208

FN208. *Cronic*, 466 U.S. at 657, 104 S.Ct. 2039 (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.1975)).

The considerations that support a presumption of prejudice-the government's responsibility for the problem and the ease with which the trial court can detect and remedy that problem prior to trial-both *373 are present here. The government is responsible for the infringement of the KPMG Defendants' rights. The problem has been detected, and it probably is susceptible of cure before trial. Were the Court to refrain from seeking to remedy the problem now, it would abdicate its responsibility to safeguard defendants' constitutional rights.

III. It is Premature to Consider the Government's Actions With Respect to Payment of Legal Expenses Incurred Before Indictment

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The KPMG Defendants argue also that the government's actions with respect to advancement of legal fees interfered with their rights prior to indictment. But the pre-indictment interference must be evaluated in a very different context.

To begin with, the legal analysis differs. The Sixth Amendment attaches only upon indictment. Actions by the government that affected only the payment of legal fees and defense costs for services rendered prior to the indictment therefore do not implicate the Sixth Amendment. Any relief must be grounded in the Due Process Clause alone.

Second, the impact of the government's actions was quite different. KPMG paid attorneys' fees prior to indictment for all of the KPMG Defendants on condition that the employees cooperate with the government. There is no suggestion that any defendant reached the $400,000 cap save Mr. Stein, and KPMG ignored the $400,000 ceiling in his case until very late in the day. In consequence, there is no reason to suppose that the ability of any of the KPMG Defendants to undertake activities designed to ward off an indictment was impaired by the government's actions save in one respect-at least some of the KPMG Defendants made proffers to the government that they conceivably would not have made had they not been induced to do so by the threat of having payment of their legal fees cut off. These proffers are of significance only if they may be used at trial, either on the government's case in chief or, perhaps more importantly, to cross examine a defendant who testifies on the defense case. This has an important consequence.

The Supreme Court has made clear that remedies for constitutional violations "should be tailored to the injury suffered ... and should not unnecessarily infringe on competing interests," including the interest in the administration of criminal justice. [FN209] Its "approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." [FN210] Hence, if the government's pressure on KPMG ultimately resulted in improperly coerced statements, the matter may be fully redressed by suppression of the statements.

FN209. *United States v. Morrison,* 449 U.S. at 365, 101 S.Ct. 665.

FN210. *Id.*

The question whether the statements should be suppressed is before the Court on another motion by the KPMG Defendants that has not yet been fully briefed. Accordingly, it would be premature to address it here.

IV. The Remedy

The next question concerns the appropriate remedy for the violation of the KPMG Defendants' constitutional rights. Defendants ask the Court to dismiss the indictment or to order payment of their legal fees either by the government or by KPMG. The government argues that any relief should be limited to requiring KPMG *374 to consider anew whether it wishes to advance expenses to the defendants, now free of the threat of government retaliation by virtue of the government's recent statement that it does not object to KPMG doing as it pleases.

The Court rejects the government's alternative. The government's belated statement that KPMG may do as it wishes without government retribution is not sufficient to put the KPMG Defendants in the position they would have enjoyed had the government not interfered with the advancement of defense costs in the first place. It ignores altogether the Court's finding that KPMG would have advanced defense costs absent the government's interference. It ignores KPMG's possible interest in not being seen to reverse course and thus as admitting that it caved in to government pressure in this respect at the expense of individual members and employees of the firm. It ignores also the fact that circumstances have changed dramatically since KPMG, under government pressure, decided in 2004 to cut off anyone who was indicted. KPMG has yielded to the government's demand that the firm pay a fine of $456 million. The individual defendants have been indicted on charges the full scope of which may not previously have been foreseeable to KPMG. Thus,

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the defense costs that KPMG is being asked to advance perhaps are larger than might earlier have been foreseeable. The resources available to pay them have been reduced. Accordingly, the Court is not persuaded that the damage the government has done can be remedied by now leaving KPMG to do as it pleases. So the Court moves on to the appropriate remedies for the government's actions.

As discussed above, remedies for constitutional violations should be tailored narrowly to the injury suffered.[FN211] Dismissal of an indictment on the grounds of prosecutorial misconduct is an "extreme and drastic sanction" [FN212] that should not even be considered unless it is otherwise "impossible to restore a criminal defendant to the position that he would have occupied" but for the misconduct. [FN213]

FN211. *Morrison,* 449 U.S. at 365, 101 S.Ct. 665.

FN212. *United States v. Rubio,* 709 F.2d 146, 152 (2d Cir.1983) (internal citations omitted); *see also Morrison,* 449 U.S. at 366 n. 3, 101 S.Ct. 665 (citing *United States v. Blue,* 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966)); *United States v. Estrada,* 164 F.3d 619, 1998 WL 716074 (2d Cir.1998); *United States v. Fields,* 592 F.2d 638, 647-48 (2d Cir.1978) , *cert. denied,*442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979).

FN213. *United States v. Artuso,* 618 F.2d 192, 196-97 (2d Cir.1980), *cert. denied,* 449 U.S. 879, 101 S.Ct. 226, 66 L.Ed.2d 102 (1980); *see also United States v. Carmichael,* 216 F.3d 224, 227 (2d Cir.2000).

The KPMG Defendants can be restored to the position they would have occupied but for the government's constitutional violation if defense costs already incurred and yet to be incurred are paid. Indeed, although the KPMG Defendants have not conceded that dismissal would be inappropriate as long as they are put in funds for their defense, they have devoted most of their attention to monetary relief. In consequence, consideration of dismissal of the indictment would be premature prior to exhaustion of all possible courses that could lead to that outcome.

A. Monetary Relief Against the Government Is Precluded by Sovereign Immunity

[11] The first avenue suggested is an order directing the government to pay. But the KPMG Defendants immediately run into the doctrine of sovereign immunity.

"Absent an express waiver of sovereign immunity, money awards cannot be imposed*375 against the United States." [FN214] Only Congress may waive sovereign immunity, and it may do so only through unequivocal statutory language.[FN215]

FN214. *McBride v. Coleman,* 955 F.2d 571, 576 (8th Cir.1992); *see also Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685-686, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983); *United States v. Bodcaw Co.,* 440 U.S. 202, 203 n. 3, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979); *United States v. Waksberg,* 112 F.3d 1225, 1227 (D.C.Cir.1997); *Robinson v. Overseas Military Sales Corp.,* 21 F.3d 502, 510 (2d Cir.1994).

FN215. *See, e.g., United States v. King,* 395 U.S. 1, 5, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969); *Samuels, Kramer & Co. v. Comm'r of Internal Revenue,* 930 F.2d 975, 983 (2d Cir.1991).

The KPMG Defendants first contend that monetary sanctions against the government pursuant to the Court's supervisory powers would not be money damages and therefore are not barred by sovereign immunity. But they point to no statute that specifically waives sovereign immunity from monetary sanctions imposed pursuant to supervisory power of the federal courts. They imply instead that supervisory powers automatically trump

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sovereign immunity, even absent a waiver.

A number of federal courts have addressed the interplay between sovereign immunity and the judiciary's power to impose monetary sanctions for litigation abuse.[FN216] Although the Second Circuit has not reached the precise question, the First Circuit's analysis in *United States v. Horn* [FN217] is instructive. There, the district court had used its supervisory powers to order the government to pay the defendants' legal fees and costs as punishment for prosecutorial misconduct. The First Circuit, however, reversed, explaining that " sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation" because

> "supervisory powers are discretionary and carefully circumscribed; [whereas] sovereign immunity is mandatory and absolute ... In other words, unlike the doctrine of supervisory power, the doctrine of sovereign immunity proceeds by fiat: if Congress has not waived the sovereign's immunity in a given context, the courts are obliged to honor that immunity." [FN218]

FN216. *See, e.g., United States v. Woodley,* 9 F.3d 774, 782 (9th Cir.1993) (noting that courts may impose monetary sanctions on the government-notwithstanding sovereign immunity-in order to remedy the violation of a recognized right and ensure that "government attorneys maintain ethical standards," but holding that monetary sanctions were inappropriate in this case and noting that other remedies are more appropriate); *Coleman v. Espy,* 986 F.2d 1184, 1191-92 (8th Cir.1993) (sovereign immunity bars compensatory contempt sanctions against the United States); *McBride,* 955 F.2d at 576-77 (noting that the district court's imposition of compensatory contempt sanctions against the government likely violated the doctrine of sovereign immunity, but reversing on other grounds); *Barry v. Bowen,* 884 F.2d 442, 443-44 (9th Cir.1989) (noting that the district court's imposition of compensatory contempt sanctions against the government likely violated the doctrine of sovereign immunity, but reversing on other grounds); *Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States,* 343 F.Supp.2d 1226, 1241 (2004) (collecting cases and holding that award of attorneys' fees against the government was barred by sovereign immunity); *United States v. Prince,* No. CR 93-1073(RR), 1994 WL 99231, *1-*2 (E.D.N.Y. Mar. 10, 1994) (withdrawing assessment of jury costs against U.S. Attorney's Office under court's supervisory power, in the face of a motion for reconsideration arguing constraints imposed by sovereign immunity); *see also Waksberg,* 112 F.3d at 1227-28 (invoking the doctrine of constitutional avoidance to defer review of the district court's finding that sovereign immunity barred the award of compensatory damages against the United States).

FN217. 29 F.3d 754, 767 (1st Cir.1994).

FN218. *Id.* at 764.
The *Horn* court noted also that courts have means apart from monetary sanctions by which to punish prosecutorial misconduct, including public reprimand and other equitable relief. *Id.* at 767.

***376** This Court agrees. Accordingly, monetary sanctions do not overcome sovereign immunity.

[12] The KPMG Defendants next argue that the Federal Tort Claims Act [FN219] (the "FTCA") and the Administrative Procedure Act [FN220] (the "APA ") waive sovereign immunity. Each, however, waives sovereign immunity only for certain civil actions against the government.[FN221] Neither deals with sanctions for prosecutorial misconduct. The KPMG Defendants point to no case law suggesting that the FTCA and APA waivers apply in this context, and the Court is aware of none. Given the Court's obligation to construe narrowly

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any statutory waiver of sovereign immunity,[FN222] it would be inappropriate to read the FTCA or the APA as waiving the government's immunity to monetary sanctions in this case.

FN219. 28 U.S.C. § 1346.

FN220. 5 U.S.C. § 702.

FN221. The FTCA waives sovereign immunity in "civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).
The APA waives immunity in "action[s] in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

FN222. "Waivers of immunity must be construed strictly in favor of the sovereign and not enlarge[d] ... beyond what the language requires." *Ruckelshaus,* 463 U.S. at 686, 103 S.Ct. 3274 (internal citations and quotation marks omitted); *Lehman v. Nakshian,* 453 U.S. 156, 161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Courts must strictly construe also any limitations or conditions imposed by Congress on a particular waiver of immunity. *Id.* at 160-61, 101 S.Ct. 2698.

Accordingly, sovereign immunity bars this Court from ordering the government to pay the KPMG Defendants' legal fees.[FN223] This is not the end of the analysis, however. As the First Circuit explained in *Horn,* "[t]he fact that sovereign immunity forecloses the imposition of monetary sanctions against the federal government in criminal cases does not leave federal courts at the mercy of cantankerous prosecutors. Courts have many other weapons in their armamentarium." [FN224] The Court therefore turns to other options, addressing first the possibility of monetary relief against KPMG.

FN223. The KPMG Defendants attempt to avoid this conclusion by asking the Court to order the government to pay their defense costs out of the $256 million fine it already has received from KPMG or to order KPMG to pay the $200 million final installment of the fine into the registry of the Court, where so much as is required to pay the defense costs would be distributed to the KPMG Defendants and the balance to the government. They appear to argue that either remedy would be injunctive in nature and not a monetary sanction against the government. Sovereign immunity, however, "stands as an obstacle to virtually all direct assaults against the public fisc, save only those incursions from time to time authorized by Congress." *Horn,* 29 F.3d at 761. The relief the KPMG Defendants have requested here would be no less an assault on the public fisc simply because it would be addressed to a fine already received by the government or monies to which the government already is entitled. Put another way, requiring the government to pay the money from a particular account or to forego revenues to which it is entitled would not make such relief any less a monetary sanction.

FN224. 29 F.3d at 766.

*377 *B. Monetary Relief May Be Available Against KPMG*

[13] The KPMG Defendants urge the Court to order KPMG to advance their defense costs. KPMG,

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which is not formally a party here but which has been heard in any case, resists on several grounds.

1. This Court Has Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. They have only such judicial power as is conferred upon them by statute and, in the case of the Supreme Court, Article III of the Constitution. [FN225]

FN225. *See, e.g., Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701-02, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *W.G. v. Senatore,* 18 F.3d 60, 64 (2d Cir.1994).

The Court's subject matter jurisdiction in this case rests on Section 3231 of the Criminal Code,[FN226] which gives "[t]he district courts of the United States ... original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." And it is well established that a district court having subject matter jurisdiction over a federal criminal case has ancillary jurisdiction over at least some related matters.[FN227]

FN226. 18 U.S.C. § 3231.

FN227. *See Garcia v. Teitler,* 443 F.3d 202, 208 (2d Cir.2006).

Our Circuit recently addressed the scope of ancillary jurisdiction in criminal cases in *Garcia v. Teitler.*[FN228] The question there presented was whether a district court had jurisdiction to order an attorney who had appeared and then withdrawn as counsel for the defendants, and who was not a party to the action, to return a retainer the defendants had paid him so that the defendants could retain another attorney to defend the case. The Court held that it did, writing:

FN228. *Id.*

"At its heart, ancillary jurisdiction is aimed at enabling a court to administer 'justice within the scope of its jurisdiction.' Without the power to deal with issues ancillary or incidental to the main action, courts would be unable to 'effectively dispose of the principal case nor do complete justice in the premises.' Along these lines, the Supreme Court has instructed that ancillary jurisdiction may be exercised 'for two separate, though sometimes related, purposes: (1) to permit disposition of claims that are, in varying respects and degrees, factually interdependent by a single court, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."
"Whatever the outer limits of ancillary jurisdiction may be, we hold that resolving a fee dispute after an attorney withdraws ... is within a district court's ancillary powers, as it relates to the court's ability to 'function successfully.' * * *
"Although [defendants] have been able to obtain new counsel, the record reflects that they are of limited means and that the funds paid to Teitler may be needed to pay their new counsel. In order to guarantee a defendant's right to choose his own counsel where, as here, his criminal case is ongoing, and to avoid the possibility of defendants becoming indigent and requiring the appointment of counsel, a district court must be able to exercise ancillary jurisdiction to resolve a fee dispute." [FN229]

FN229. *Id.* at 208, 209 (internal citations omitted).

***378** So too here. While the KPMG Defendants all are represented by retained counsel, the cost of mounting their defenses in this complex case is potentially very large. In order to guarantee their right to choose their own counsel, to ensure that they can afford to pay those counsel to do what they think appropriate to defend the case, and to avoid the possibility of their becoming indigent and requiring the appointment of counsel, this Court has the power to exercise ancillary jurisdiction to resolve their right to the advancement of expenses by KPMG.[FN230] This is confirmed by *United States v. Weissman,*[FN231] cited with approval in

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Garcia, in which Judge Haight exercised ancillary jurisdiction to determine whether a company that formerly employed an individual who was facing criminal charges in this Court was obliged to continue to advance the defense costs.

FN230. The Court need not here decide whether its ancillary jurisdiction includes the power to determine whether KPMG is obliged to indemnify the KPMG Defendants or, if not, whether the KPMG Defendants would be obliged to repay any funds advanced to them. The immediate concern is with the Court's power to ensure that the KPMG Defendants, if they are entitled to it, have the means to finance the defense before this Court.

FN231. 1997 WL 334966 at *9.

Accordingly, the Court holds that it has ancillary jurisdiction to determine the claims of the KPMG Defendants for advancement. As Judge Gleeson did in *Garcia,* the Court will direct the Clerk, as a matter of administrative convenience, to open a civil docket number for the claims of the KPMG Defendants against KPMG.[FN232]

FN232. *Garcia v. Teitler,* No. 04 Civ. 0832(JG), 2004 WL 1636982, *1 n. 2 (E.D.N.Y. July 22,2004), *aff'd,*443 F.3d 202 (2d Cir.2006).

2. Personal Jurisdiction, Even If It Does Not Already Exist, May Be Obtained Over KPMG

The fact that the Court has subject matter jurisdiction is not alone sufficient to proceed with the claims. KPMG objects that it is not a party to this action and that the Court lacks jurisdiction over its person.

KPMG of course is not a defendant in this case.[FN233] Nevertheless, it long has been well aware of these proceedings. It attended the hearing and submitted papers. But it never has been served with a summons and complaint seeking advancement of legal fees.

FN233. It is a defendant in a related action in this district, that commenced by the filing of the information pursuant to the DPA. *United States v. KPMG LLP,* 05 Crim. 0903(LAP) (filed Aug. 29, 2005).

There is reason to question whether the lack of a summons and complaint, which ordinarily would be fatal in a garden-variety civil case,[FN234] should have that consequence in the unique circumstances here.[FN235] But it is unnecessary to go down that path, which in any case would threaten*379 to complicate and perhaps delay the important determination that may lie within this Court's province-whether KPMG must at least advance defense costs to the KPMG defendants.

FN234. *See, e.g., Osrecovery, Inc. v. One Group Int'l, Inc.,* 234 F.R.D. 59, 60-61 (S.D.N.Y.2005).

FN235. Some states, at least in the past, held that a defendant who appeared in an action for any purpose consented to the exercise of personal jurisdiction, *See York v. Texas,* 137 U.S. 15, 11 S.Ct. 9, 34 L.Ed. 604 (1890). To ameliorate this rule, many adopted statutes or rules permitting a defendant who wished to challenge the exercise of personal jurisdiction to appear specially for that purpose alone without thereby appearing generally. *See id.* at 20, 11 S.Ct. 9; *see also, e.g., Orange Theatre Corp. v. Rayherstz Amusement Corp.,* 139 F.2d 871, 874 (3d Cir.1944). Even in such states, any action before the court beyond challenging the exercise of jurisdiction constitutes a general appearance and waives the jurisdictional objection. *See, e.g., Regents of the Univ. of Calif. v. Golf Mktg., LLC,* 92 Conn.App. 378, 381-82, 885 A.2d 201, 203 (2005) (party who seeks relief on any basis other than a motion to quash for lack of personal jurisdiction deemed to have made general

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> appearance and waived all objections to defects in service, process, or personal jurisdiction) (California law) (quotation marks omitted); *Davis v. Eighth Jud. Dist. of Nevada,* 97 Nev. 332, 334-36, 629 P.2d 1209, 1211-12 (1981) (opposition to motion for leave to amend waived special appearance and subjected party to personal jurisdiction), *abrogated by statute as recognized in Hansen v. Eighth Jud. Dist. Ct.,* 116 Nev. 650, 655-56, 6 P.3d 982, 985 (2000); *Woods v. Billy's Automotive,* 622 S.E.2d 193, 197 (N.C.App.2005) (" [I]f a party invoked the judgment of the court for any other purpose [than contesting service of process] he made a general appearance and by so doing he submitted himself to the jurisdiction of the court whether he intended to do so or not.") (citation and internal quotation marks omitted); *Lyren v. Ohr,* 271 Va. 155, 158-59, 623 S.E.2d 883, 884-85 (2006) (appearance for any purpose other than objecting to the jurisdiction is general appearance even if denominated "special"); *Maryland Cas. Co. v. Clintwood Bank, Inc.,* 155 Va. 181, 186, 154 S.E. 492, 494 (1930) (any action by defendant, except an objection to jurisdiction, recognizing a case as in court is general appearance).
> The Federal Rules of Civil Procedure, and many modern state codes, go further, abolishing the distinction between general and special appearances and permitting a defendant to preserve a personal jurisdiction objection by answer or timely motion to dismiss. These rules, however, do not apply in a criminal case. It therefore is arguable that KPMG's actions before the Court constituted a general appearance and thus waived any objection to personal jurisdiction.

The KPMG Defendants, if so advised, may file a complaint in the civil file opened pursuant to this decision, obtain the issuance of a summons, and serve KPMG provided they do so within 14 days of the date of this decision. The complaint may contain a prayer for declaratory relief and a request for a speedy hearing,[FN236] which would be appropriate in any case in view of the fact that the determination of rights to advancement is made in summary proceedings [FN237] in order to permit the issue to be decided while the underlying case is pending.[FN238] Should that occur, the matter ***380** would proceed expeditiously.[FN239]

FN236. FED.R.CIV.P. 57.

FN237. *See* 6 WEST'S DEL.CODE ANN. § 145(k) (2006); N.Y. BUS. CORP. L. §§ 724(a), 1319(a)(4) (McKinney 2003). *See generally* Steven A. Radin, *"Sinners Who Find Religion": Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing,* 25 REV. LITIG. 251, 263-68 (2006) (hereinafter "Radin") (summarizing Delaware cases on summary nature of advancement proceedings).
The scope of an advancement proceeding " is limited to determining 'the issue of entitlement according to the corporation's advancement provisions and not to issues regarding the movant's alleged conduct in the underlying litigation.' " *Kaung,* 884 A.2d at 509 (Del.2005) (quoting *Homestore, Inc. v. Tafeen,* 886 A.2d 502, 503 (Del.2005)). "Neither indemnification nor recoupment of sums previously advanced are appropriate for litigation in a summary proceeding" and necessarily would be reserved for subsequent proceedings, possibly in another forum. Radin, 25 REV. LITIG. at 265-66. In any case, although it is unnecessary to decide the issue now, it is questionable whether the Court's ancillary jurisdiction extends beyond determining the right to advancement.
There is no jurisdictional obstacle to a federal court determining advancement under state law. *See, e.g., Truck Components Inc. v. Beatrice Co.,* 143 F.3d 1057, 1061 (7th Cir.1998).

FN238. The Federal Rules of Criminal Procedure state that they "are to be

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> interpreted for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." FED.R.CRIM.P. 2. Likewise, the Federal Rules of Civil Procedure, which govern " all suits of a civil nature," are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED.R.CIV.P. 1. Accordingly, the Court will treat the papers already filed by the KPMG Defendants as a motion for an order directing KPMG to advance the defense costs reasonably incurred and to be incurred by them from the date of the indictment forward. It will consider the papers already filed by KPMG as an opposition to that motion. KPMG may file such additional response as it wishes within 14 days after the date of service of any summons and complaint.
>
> FN239. The Court is mindful of KPMG's contention that those of the KPMG Defendants who were partners in the firm are obliged by the partnership agreement to arbitrate the issue of advancement. Assuming that the KPMG Defendants pursue relief against KPMG and that KPMG remains insistent upon its alleged arbitration remedy, the questions whether the arbitration clause properly is so construed and, if so, whether it is void as against public policy to the extent that it would foreclose an advancement determination in a criminal case by the court in which the indictment is pending will be addressed in any advancement proceeding the KPMG Defendants may bring pursuant to this decision.

C. Possible Dismissal and Other Remedies

A summary advancement proceeding is not the only means by which the KPMG Defendants might be restored to the position they would have occupied had the government not interfered improperly with their prospects for advancement of defense costs.

The government has substantial influence and, almost certainly, power over KPMG by virtue of the cooperation clauses in the DPA. It may well be in its interest to use that influence or power to cause KPMG to advance the defense costs.[FN240]

> FN240. Among other avenues open to the government if it were disposed to seek to remedy the problem it has created might be to persuade KPMG to eliminate obstacles to prompt resolution of the advancement issue. KPMG might, for example, waive any right that it may have to compel its former partners to arbitrate, or to claim a jury trial on, the question whether the KPMG Defendants are entitled to advancement of defense costs. Such a waiver need not affect any claims by the KPMG Defendants for indemnification (as distinguished from advancement) by KPMG or any claims that KPMG may have against the KPMG Defendants, neither of which would be a proper subject of a summary advancement proceeding in any event.

Nor is KPMG lacking in incentives, if it needs them, to aid the government in solving the problem the government created for itself. The government now may seek to use its leverage against KPMG to cause KPMG to advance defenses costs in order to avoid any risk of dismissal of this indictment or other unpalatable relief. Moreover, KPMG may conclude that obstruction of the efforts of its former partners and employees to obtain advancement of defense costs, or even a prompt adjudication of their right to such advancement, would not further its interest in recruiting and retaining top flight personnel.

Thus, there are at least two possibilities for resolving the issue of advancement of defense costs. KPMG, either on its own or at the government's urging or insistence, may advance the defense costs. Alternatively, the KPMG Defendants may succeed in obtaining an advancement order in a summary

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proceeding before this Court. In either event, the effect of the government's unconstitutional interference would have been remedied or, at least, mitigated substantially. Should that come to pass, the possibilities of dismissal of the indictment and other remedies likely would appear in a different light. In consequence, the Court declines to consider additional relief at this time, although it may do so in the future if KPMG does not, for one reason or another, advance defense costs.

V. Some of the Actions of the USAO in Response to the Motion Were Not Appropriate

The foregoing discussion of remedies is addressed solely to the unconstitutional interference***381** with the KPMG Defendants' prospects of obtaining advancement of defense costs from KPMG. One matter remains-the actions of the USAO in resisting this motion.

The Court begins from a widely held premise. We long have been well-served by the United States Attorney's office for this district and by the many lawyers who have served in it with great distinction. It is a model for the nation.[FN241] While the office's actions in this case with respect to the advancement of attorneys' fees contributed to an unconstitutional result, they were consistent with policies established in Washington. Moreover, they occurred at a time when the propriety of those policies had not previously been addressed by any court. The Court declines to chastise the office or its members further on the basis of those actions. There is, however, one matter that should be addressed.

FN241. *See generally* Lewis A. Kaplan, *Henry L. Stimson Award Ceremony: Remarks,* 54 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 420 (1999).

The government was economical with the truth in its early responses to this motion. It is difficult to defend even the literal truth of the position it took in its first memorandum of law. KPMG's decision on payment of attorneys' fees was influenced by its interaction with the USAO and thus cannot fairly be said to have been a decision "made by KPMG alone, " as the government represented. The government's assertion that the legal fee decision was made without "coercion" or "bullying" by the government can be justified only by tortured definitions of those terms. And while it is literally true, as Mr. Weddle wrote in his later declaration, that the government did not "instruct" or "request" KPMG to do anything with respect to legal fees, that was not the whole story. Those submissions did not even hint at Ms. Neiman's "rewarding misconduct" comment or at Mr. Weddle's statement that the USAO would look at the payment of legal fees "under a microscope." In addition, they soft-pedaled the government's use of KPMG's willingness to cut off payment of legal fees to pressure KPMG personnel to waive their Fifth Amendment rights and make proffers to the government. Those omissions rendered the declaration and the brief that accompanied it misleading.

Every court is entitled to complete candor from every attorney, and most of all from those who represent the United States. These actions by the USAO are disappointing. There should be no recurrence.

Conclusion

The Thompson Memorandum's treatment of advancement of defense costs no doubt serves the government's interest in obtaining criminal convictions in complex business cases. So too the actions of the USAO in this case. But the government's proper concern is not with obtaining convictions.

As a unanimous Supreme Court wrote long ago, the interest of the government "in a criminal prosecution is not that it shall win a case, but that justice shall be done." [FN242] Justice is not done when the government uses the threat of indictment-a matter of life and death to many companies and therefore a matter that ***382** threatens the jobs and security of blameless employees [FN243]-to coerce

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companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law. If those whom the government suspects are culpable in fact are guilty, they should pay the price. But the determination of guilt or innocence must be made fairly-not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun.

> FN242. *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) ; *see also, e.g., Brady,* 373 U.S. at 87, 83 S.Ct. 1194 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly under the federal domain: 'The United States wins a point whenever justice is done its citizens in the courts.' ").

> FN243. The indictment of Arthur Andersen LLP resulted in the effective demise of that large accounting firm, and the loss of many thousands of jobs of innocent employees, long before the case ever went to trial.

The motions of the KPMG Defendants to dismiss the indictment or for other relief are granted only to the extent that:

1. The Court declares that so much of the Thompson Memorandum and the activities of the USAO as threatened to take into account, in deciding whether to indict KPMG, whether KPMG would advance attorneys' fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution.

2. The government shall adhere to its representation that any payment by KPMG of the defense costs of the KPMG Defendants is acceptable to the government and will not be considered in determining whether KPMG has complied with the DPA or otherwise prejudice KPMG.

3. The Clerk shall open a civil docket number to accommodate the claims of the KPMG Defendants against KPMG for advancement of defense costs should they elect to pursue them. If they file a complaint within 14 days, the Clerk shall issue a summons to KPMG. The Court in that event will entertain the claims pursuant to its ancillary jurisdiction over this case.

The motions are denied insofar as they seek monetary sanctions against the government. The Court reserves decision as to whether to grant additional relief.

The foregoing constitute the Court's findings of fact and conclusions of law.

SO ORDERED.

S.D.N.Y.,2006.
U.S. v. Stein
435 F.Supp.2d 330, 97 A.F.T.R.2d 2006-3138

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(Cite as: 495 F.Supp.2d 390)

H
U.S. v. Stein
S.D.N.Y.,2007.

United States District Court,S.D. New York.
UNITED STATES of America,
v.
Jeffrey STEIN, et al., Defendants.
No. S1 05 Crim. 0888(LAK).

July 16, 2007.

Background: Government indicted employees of accounting firm for accounting fraud. Employees moved for dismissal of indictment.

Holdings: The District Court, Kaplan, J., held that:

(1) government's inducement of employer's cut-off of defense costs for its employees violated due process;

(2) dismissal of indictments against current employees was appropriate remedy; and

(3) dismissal of indictments against former employees was not warranted.

Motions granted in part and denied in part.
West Headnotes
[1] Constitutional Law 92 ⚿3895

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3895 k. Reasonableness, Rationality, and Relationship to Object. Most Cited Cases
Substantive component of Due Process Clause protects individual against government's exercise of power without any reasonable justification in service of legitimate governmental objective. U.S.C.A. Const.Amends. 5, 14.

[2] Constitutional Law 92 ⚿3896

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3896 k. Egregiousness; "Shock the Conscience" Test. Most Cited Cases
In determining whether conduct of particular government employee or official violates substantive component of Due Process Clause, question is whether conduct shocks conscience. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law 92 ⚿3896

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3896 k. Egregiousness; "Shock the Conscience" Test. Most Cited Cases

Constitutional Law 92 ⚿3911

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3908 Mental State
92k3911 k. Negligence, Recklessness, or Indifference. Most Cited Cases
Liability for negligently inflicted harm is categorically beneath threshold of constitutional due

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process, while conduct intended to injure in some way unjustifiable by any government interest is sort of official action most likely to rise to conscience-shocking level. U.S.C.A. Const.Amends. 5, 14.

[4] Constitutional Law 92 ⚿4629

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4627 Conduct and Comments of Counsel; Argument
92k4629 k. Prosecutor. Most Cited Cases

Criminal Law 110 ⚿700(1)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(1) k. In General; Misconduct in General. Most Cited Cases
Government's inducement of employer's cut-off of defense costs for its employees was part of broader pattern of government misconduct that shocked conscience, in violation of employees' right to substantive due process, where prosecutors emphasized to employer existence of Justice Department memorandum providing that payment of attorney fees of culpable employees would be considered as negative factor in determining whether employer's degree of cooperation was sufficient to forestall indictment against employer itself, and employer's refusal to pay post-indictment legal fees caused employees to restrict activities of their counsel, limited or precluded their attorneys' review of documents produced by government in discovery, prevented them from interviewing witnesses, caused them to refrain from retaining expert witnesses, and left them without information technology assistance necessary for dealing with mountains of electronic discovery. U.S.C.A. Const.Amend. 5.

[5] Indictment and Information 210 ⚿144.1(1)

210 Indictment and Information
210IX Motion to Dismiss
210k144.1 Grounds
210k144.1(1) k. In General. Most Cited Cases
Dismissal of indictment on grounds of prosecutorial misconduct is extreme and drastic sanction that should not even be considered unless it is otherwise impossible to restore criminal defendant to position that he would have occupied but for misconduct.

[6] Criminal Law 110 ⚿661

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and Scope of Proof. Most Cited Cases
Criminal defendant has constitutional right to control presentation of his defense. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ⚿641.10(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.10 Choice of Counsel
110k641.10(1) k. In General; Forcing Counsel on Accused. Most Cited Cases
Inherent in defendant's right to control presentation of his defense is right to choose counsel who presents it, which includes right to second lawyer or law firm if defendant can afford it, either from his own resources or from resources lawfully available to him from others. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚿641.10(1)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.10 Choice of Counsel

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110k641.10(1) k. In General; Forcing Counsel on Accused. Most Cited Cases

Criminal Law 110 ⚿1166.10(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.10 Counsel for Accused
110k1166.10(1) k. In General. Most Cited Cases
Unjustified denial of right to counsel of one's choice violates Sixth Amendment without regard to considerations of prejudice. U.S.C.A. Const.Amend. 6.

[9] Indictment and Information 210 ⚿144.1(1)

210 Indictment and Information
210IX Motion to Dismiss
210k144.1 Grounds
210k144.1(1) k. In General. Most Cited Cases
Dismissal of indictment against accounting firm's current members was appropriate remedy for government's unjustified actions to preclude firm from paying for its members' attorneys in tax and accounting fraud prosecution, in violation of members' substantive due process rights and their Sixth Amendment right to counsel of their choice, even though most members had assets in $1 to $3 million range, and members were entitled to representation by appointed counsel once they qualified financially, where projected defense costs were in range of $3 to $24 million per member, members lacked resources to engage lawyers of their choice, and appointed counsel might be limited in their ability to mount defenses that members otherwise would have presented in consequence of need to justify expenditures to court and risk that sufficient funds would not be available. U.S.C.A. Const.Amends. 5, 6.

[10] Indictment and Information 210 ⚿144.1(1)

210 Indictment and Information
210IX Motion to Dismiss
210k144.1 Grounds
210k144.1(1) k. In General. Most Cited Cases
Dismissal of indictment against accountants was not warranted in tax and accounting fraud prosecution, even though government had improperly precluded their former employer from paying for defense counsel in matter, and indictment embraced some conduct in which accountants allegedly engaged while still at firm, where majority of alleged crimes took place after they had left firm, and there was no indication that employer had contractual or other legal obligation to defend them.

[11] Indictment and Information 210 ⚿144.1(1)

210 Indictment and Information
210IX Motion to Dismiss
210k144.1 Grounds
210k144.1(1) k. In General. Most Cited Cases
Dismissal of indictment against accounting firm's former employee was not warranted in tax and accounting fraud prosecution, despite government's improper action to preclude firm from paying for defense counsel for its current members, where employee left firm before indictment under strained circumstances, entered into settlement agreement pursuant to which he received substantial payment, and gave firm release.

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Susan R. Necheles, Hafetz & Necheles, for Defendant Richard Rosenthal.
Richard M. Strassberg, David B. Pitofsky, Goodwin Procter LLP, for Defendant David Greenberg.

KAPLAN, District Judge.

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***393** The government threatened to indict, and thus to destroy, the giant accounting firm, KPMG LLP (" KPMG"). It coerced KPMG to limit and then cut off its payment of the legal fees of KPMG employees. KPMG avoided indictment by yielding to government pressure. Many of its personnel did not. They now await trial, four of them deprived of counsel of their choice and most of the others unable to afford the defenses that they would have presented absent the government's interference.

This Court previously held that the government's interference with KPMG's payment of the legal fees of its employees and former employees violated the employees' constitutional rights. The government now concedes that thirteen of the sixteen individuals formerly employed by KPMG (the " KPMG Defendants") are entitled to dismissal, assuming that this Court's previous ruling was correct. But the government does not concede the correctness of that ruling.[FN1] Accordingly, the Court has reconsidered *Stein I* carefully in light of the government's arguments. It remains convinced that the ruling was correct. Indeed, additional evidence not previously considered strongly supports the Court's decision. The government, however, now has focused for the first time on the specific circumstances of certain of these defendants. The Court concludes that three of ***394** the defendants have not established that KPMG would have paid their defense costs even if the government had left KPMG to its own devices. The indictment therefore will be dismissed as to thirteen of the sixteen KPMG Defendants. The case will proceed to trial on the charges against the other three as well as two additional defendants who never were employed by KPMG and whose rights

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therefore were not violated.

FN1. In an appeal from another decision in this case, the government challenges certain of the Court's factual findings as clearly erroneous and disputes its legal conclusions. Appellant's brief ("Govt. App. Br."), *United States v. Stein,* No. 06-3999 (2d Cir. filed Nov. 16, 2006) 46*et seq.* Citations herein to "A" and "SA" refer, respectively, to the Joint Appendix and Supplemental Appendix filed with the Second Circuit in this appeal.
Citations herein to "K," "U," and "DX" refer to documents introduced into evidence at the fee hearing.

I. Introduction

The indictment charges nineteen defendants, seventeen of them formerly partners or employees of KPMG, with conspiracy and tax evasion.[FN2] It asserts also that KPMG, which entered into a deferred prosecution agreement with the government, was an unindicted co-conspirator.

FN2. Three defendants are charged also with obstruction in violation of 26 U.S.C. § 7212 and 18 U.S.C. § 2.
One of the nineteen, a former KPMG employee, has pleaded guilty.

This Court held in *Stein I*[FN3] that the government violated the Fifth and Sixth Amendment rights of the KPMG Defendants by causing KPMG to depart from its prior practice of paying the legal expenses of KPMG personnel in all cases in which they were sued in consequence of their activities on behalf of the firm. It found that KPMG would have paid those expenses-whether legally obliged to do so or not-but for the government's improper actions. The Court, however, deferred the request of the KPMG Defendants to dismiss the indictment, reasoning that dismissal might prove inappropriate if KPMG were obligated to advance the defense costs. In that case, all or much of the harm caused and still threatened by the government's actions might be remedied or avoided. The Court held that it had ancillary jurisdiction over the KPMG Defendants' claims against KPMG for advancement of defense costs and permitted the assertion of those claims in this case.[FN4] The Court of Appeals, however, recently held that this Court lacks ancillary jurisdiction with respect to the fee advancement claims against KPMG.[FN5] Other efforts to resolve this question have failed.[FN6] In consequence, the matter is before the Court on the renewed applications of the KPMG Defendants to dismiss the indictment on the basis of the government's violations of their constitutional rights. Before proceeding to the question of remedy, however, the Court first addresses the government's principal attack on *Stein I,* its claim that the decision rests on clearly erroneous findings of fact.

FN3. *United States v. Stein,* 435 F.Supp.2d 330 (S.D.N.Y.2006).

FN4. *Id.* at 377-78.

FN5. *Stein v. KPMG, LLP,* 486 F.3d 753 (2d Cir.2007).

FN6. The Court months ago referred KPMG and the KPMG Defendants to the Honorable Miriam Goldman Cedarbaum for the purpose of exploring the possibility of settling the claims of the KPMG Defendants against KPMG for advancement of their defense costs in this case. That effort was unsuccessful. The Court nevertheless is grateful to Judge Cedarbaum for her characteristically gracious, skilled and determined effort.

II. The Factual Bases of the Court's Constitutional Holdings

The government challenges three pivotal factual findings upon which *Stein I* rests, viz.:
• "[T]he Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with the [United States Attorney's Office ("USAO"

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)]. As a direct result of the threat to the firm *395 inherent in the Thompson Memorandum, it sought an indication from the USAO that payment of fees in accordance with its settled practice would not be held against it." FN7

FN7. *Stein I,* 435 F.Supp.2d at 352.

• "[T]he USAO did not give KPMG the comfort it sought. To the contrary, it deliberately ... reinforced the threat inherent in the Thompson Memorandum. It placed the issue of payment of legal fees high on its agenda for its first meeting with KPMG counsel, which emphasized the prosecutors' concern with the issue. [Assistant United States Attorney ("AUSA")] Weddle raised the issue [at the February 25, 2004 meeting] and then repeatedly focused on KPMG's 'obligations,' thus clearly implying-consistent with the language of the Thompson Memorandum-that compliance with legal obligations would be countenanced, but that anything more than compliance with demonstrable legal obligations could be held against the firm. [AUSA] Neiman's statement, in response to a comment about payment of legal fees by KPMG, that misconduct should not be rewarded quite reasonably was understood in the same vein, whatever its intent. And Mr. Weddle's colorful warning that the USAO would look at any discretionary payment of fees by KPMG 'under a microscope' drove the point home." FN8

FN8. *Id.* at 352-53.

• "KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO. Absent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and employees both prior to and after indictment, without regard to cost." FN9

FN9. *Id.* at 353.
The Court, although it would have reached the same result and made the findings summarized above in *Stein I* in any case, found also that "the government," as evidenced in part by the Thompson Memorandum as well as certain actions by the USAO, "conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys." *Id.* The Court has reconsidered that finding in light of the government's recent arguments and adheres to it.

A. The Thompson Memorandum

The government argues first that the Court misinterpreted the Thompson Memorandum. The Memorandum did not, the government contends, discourage payment of legal fees for company employees by increasing the risk of indictment of a company under investigation that chooses to make such payments.FN10 The Court disagrees. Not only is the Court's reading of the document correct, and in any case certainly well within the bounds of its role as fact finder,FN11 but it is a reading shared *396 by the Bar in general and KPMG's counsel in particular.

FN10. *See* Govt. App. Br. at 47-56.

FN11. Even if the document were ambiguous, and it is not, the resolution of that ambiguity would present a question of fact committed to the trial judge. *See K. Bell & Assocs., Inc. v. Lloyd's Underwriters,* 97 F.3d 632, 637 (2d Cir.1996) ("Where there are alternative, reasonable constructions of a contract, *i.e.,* the contract is ambiguous, the issue ' should be submitted to the trier of fact.' ") (quoting *Consarc Corp. v. Marine Midland Bank, N.A.,* 996 F.2d 568, 573 (2d Cir.1993)); *Easton v. Pub. Citizens, Inc.,* No. 91 Civ. 1639(JSM), 1991 WL 280688, at *2 (S.D.N.Y. Dec.26, 1991) (" [I]f the Court finds that the wording in the [documents] is ambiguous, then the finder

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of fact must determine how to interpret it.") (citing *Davis v. Ross,* 754 F.2d 80, 82-83 (2d Cir.1985)).

1. The Text

The Thompson Memorandum, before it was superseded following *Stein I,*[FN12] made cooperation with a government investigation a factor to be considered in deciding whether to indict a corporation or other business entity. It stated that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection." [FN13] It then went on to say:

> FN12. On December 12, 2006, the Department of Justice ("DOJ") issued a revised version of the Thompson Memorandum, known as the McNulty Memorandum. Under the guidelines set forth in the McNulty Memorandum, " [p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment," with exceptions to occur only in " extremely rare cases." McNulty Memorandum at 11 & n. 3, *available at* http: //www. usdoj. gov/ dag/ speeches/ 2006/ mcnulty -memo. pdf.
>
> FN13. Thompson Memorandum at 6, *available at* http:// www. usdoj. gov/ dag/ cftf/ business - organiz ations. pdf.

"Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, *either through the advancing of attorneys fees,* through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." [FN14]

> FN14. *Id.* at 7-8 (emphasis added, footnote omitted).
> It contained also the following footnote: " Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate." *Id.* at 8 n. 4.

The Thompson Memorandum thus made clear that advancing attorneys' fees to personnel of a business entity under investigation, except where such advances were required by law, might have been viewed by the government as protection of culpable individuals and thus contribute to a government decision to indict the entity.

The government nevertheless argues that there was no evidence that the Thompson Memorandum discouraged companies from paying employees' legal fees by increasing the perceived risk of indictment for companies that did so.[FN15] It suggests that there was no reason to believe that the defense bar-including KPMG's counsel-ever read the Thompson Memorandum to convey such a threat.[FN16] Indeed, it argues that "none of the prosecutors read the Thompson Memorandum in this way." [FN17] They construed the document, the government says, to mean that "the payment of legal fees [wa]s considered only when the Government believed such payments were part of an effort to 'circle the wagons,' an effort to appear cooperative while protecting culpable employees." [FN18]

> FN15. Govt. App. Br. 47-48.
>
> FN16. *See id.* at 52-53.

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FN17. *Id.* at 51.

FN18. *Id.*

*397 The Thompson Memorandum is inconsistent with the government's argument. It says clearly that, "depending on the circumstances, a corporation's ... advancing of attorneys fees" could be viewed as "protecting its culpable employees and agents." The government's "circle the wagons" gloss simply is not in the text. Any competent lawyer reading the document would regard a corporate client that was under investigation as being at greater risk of indictment if it advanced legal fees to employees who might be viewed by prosecutors as culpable than if it did not advance legal fees. That is the plain meaning of the language.[FN19] The Justice Department itself undoubtedly recognized this when, following *Stein I,* it changed it in the McNulty Memorandum.[FN20] But this reading of the plain language of the document is supported by far more.

FN19. This appears to be the view taken by the only other decision to have addressed the question, where the district court, though finding no constitutional violation on the facts, stated that its determination was "in no way an endorsement of the Thompson Memorandum policy directive with respect to an organization's payment or advancement of attorney fees for employees who are targets or subjects of criminal investigations. Indeed, that policy is unquestionably obnoxious in general and is fraught with the risk of constitutional harm in specific cases." *United States v. Rosen,* 487 F.Supp.2d 721, 737 (E.D.Va.2007).

FN20. *See* supra note *11.*

2. The Bar's Understanding of the Thompson Memorandum

There can be no serious doubt that the Bar, as the Court properly inferred from the text of the Thompson Memorandum and the testimony of KPMG's then-deputy general counsel,[FN21] read the Thompson Memorandum as discouraging payment of legal fees for company employees under investigation by holding out the prospect that doing so would increase the risk of indictment. This view is supported by an abundance of published statements and literature, including

FN21. Joseph Loonan testified as follows:
"Q. Okay. From the time when you first got involved in the investigation and began at KPMG, did you have an understanding that KPMG was going to need to cooperate in the government's investigation in order to have a chance of avoiding indictment?
A. It was my understanding that the government's guidelines expected entities to cooperate in investigations.
"Q. Did you understand that that was one of the factors that the Department of Justice would consider in deciding whether to indict KPMG? A. Yes.
"Q. Did you understand that one aspect of cooperation that was specifically spelled out in the Thompson memo was the company's attitude toward payment of legal fees for persons who were accused by the government of wrongdoing? [colloquy omitted] A. Yes."Tr., May 8, 2006 (Loonan) 134:2-18.

(a) Former U.S. Attorney General Edwin Meese III:
"Even if no prosecutor ever mentions [waiving attorney-client privilege and cutting off payment of employees' attorney fees] to a company, the fact that the Thompson Memorandum requires federal prosecutors to take all nine of its factors into consideration when deciding whether to indict a business organization necessarily places great pressure on the company to take these two steps. As the Thompson Memorandum itself emphasizes, a 'prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute' a business organization. The company and its counsel know that the prosecution team will eventually go through each of the nine factors point by point. Any outright 'No' in response to

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whether the company has cooperated with one *398 of the factors will be glaringly apparent." [FN22]

FN22. Edwin Meese III, Statement Before the United States Senate Committee on the Judiciary Regarding the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations (Sept. 12, 2006) ("Meese Senate Statement"), *available at* http:// judiciary. senate. gov/ testimony. cfm? id= 2054 & wit -id=5741.

(b) KPMG Lead Counsel Robert Bennett:
"[T]he Thompson memorandum makes clear that corporations that cooperate in the prosecution of employees stand a greater chance of avoiding corporate indictment.

* * *

"Where ... it appears that criminal conduct occurred, it generally is advisable to not advance fees. Indeed, to do so may be construed by the government as a lack of cooperation by the corporation, an impediment to its investigation, and an indication of a failure of corporate responsibility. " [FN23]

FN23. Robert S. Bennett et al., *The Role of Internal Investigations in Defending Corporations Against Charges of Foreign Bribery* (Skadden, Arps, Slate, Meagher & Flom LLP, Washington, D.C.), 2005 at 17, 19, *available at* http:// skadden practices. skadden. com/ fcpa/ index. php? document ID= 28 & sectionID=32.

(c) ABA President Karen J. Mathis:
"[T]he Thompson Memorandum encourages prosecutors to deny cooperation credit to companies and other organizations that assist or support their so-called 'culpable employees and agents' who are the subject of investigations by ... providing or paying for their legal counsel." [FN24]

FN24. Karen J. Mathis, Statement Before the Committee on the Judiciary of the United States Senate Concerning the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations (Sept. 12, 2006), *available at* http:// judiciary. senate. gov/ testimony. cfm? id= 2054 & wit -id=5742.

(d) The American College of Trial Lawyers:
"Defense counsel and their clients increasingly find government resistance to corporate efforts to advancing attorneys' fees to individual employees once a government investigation has been commenced. Although individuals under investigation or charged by the government are entitled to obtain qualified, independent counsel without interference from the government, federal prosecutors frequently object to a corporation providing counsel for its employees and penalizes [sic] the company for not cooperating with the government investigation.

* * *

"[T]he guidance recently issued to federal prosecutors in the Holder Memo Standards [[FN25]] could, and does, generate interference with the principle that non-government employees facing government investigation or prosecution are entitled to qualified, competent representation. Today, it is common for defense counsel to be confronted by a federal prosecutor who believes that a corporation is not fully cooperating with the government in a federal criminal investigation solely because the corporation is paying the legal fees for an officer, director or employee." [FN26]

FN25. The part of the Holder memorandum addressed here was identical to the corresponding part of the Thompson Memorandum. Tr., May 9, 2006 (Neiman) 266:7-11.

FN26. American College of Trial Lawyers, *The Erosion of the Attorney-Client*

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Privilege and Work Product Doctrine in Federal Criminal Investigations, 41 DUQ. . 307, 331, 335 (2003).

***399** *(e) The United States Chamber of Commerce:*
"Federal investigators often object to the payment by corporations of the legal fees for their employees. The Thompson memorandum specifically identifies advancement of legal fees to employees as a negative factor when deciding whether a company has cooperated with the government. This policy deals a serious blow to the ability of employees to vindicate their legal rights without suffering financial ruin." FN27

FN27. United States Chamber of Commerce, Testimony Before the American Bar Association Task Force on Attorney-Client Privilege (Feb. 22, 2005), *available at* http:// www. abanet. org/ buslaw/ attorney client/ public hearing 20050211/ testimony/ chamberof commerce. pdf.

(f) Law Review Articles:

Law review articles echo this understanding of the Thompson Memorandum. One article, written shortly after the Thompson Memorandum issued, bluntly framed the dilemma facing corporations:
"The renewed emphasis [of the Thompson Memorandum] on total, quick, and effective cooperation leaves little doubt that any corporation posturing itself for leniency in the form of non-prosecution should consider a contingency plan early on in the process of an internal investigation that contemplates ... carefully examining governing law on indemnification of legal representation expenses and the advancing of attorneys fees to employees that become subjects of the government's inquiry....

* * *

"The Thompson Memo seems to create an uncomfortable choice for the corporation: cooperate (i.e., turn over all witness interviews and other evidence gathered during the course of the internal investigation, make employees available to the government for witness interviews, desist from entering into joint defense agreements with employees, *refrain from advancing legal fees to employees that may have violated [the] law,* and discipline employees that may have violated the law) and hope to escape indictment, or close ranks and prepare the defense. *The four corners of the policy leave little room for compromise between these bipolar extremes.*" FN28

FN28. Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America,* 45 S. TEX. L.REV. 111, 116-17 (2003) (emphasis added); *see also* Peter J. Henning, *Targeting Legal Advice,*54 AM. U.L.REV. 669, 699 (2005) (noting that the Thompson Memorandum's fee advancement factor means "a corporation that does not immediately turn on a potentially culpable employee has not cooperated and may suffer an indictment itself'); Petra M. Reinecke & Douglas R. Schwartz, *The Perils, Pitfalls and Possible Demise of the Joint Defense Agreement in the Context of Shipboard Criminal Investigations and Prosecutions,* 17 U.S.F. MAR. L.J. 29, 40-41 (2005) ("Both the Holder and Thompson Memoranda specifically authorize a prosecutor to view the advancement of legal fees for 'culpable ' employees as lack of cooperation by the company, and to factor this into the decision as to whether to charge the company. Since a decision to retain counsel and advance legal fees to its [employees] often must be made long before there is a sufficient factual basis upon which to assess the individual's ' culpability,' the prosecutorial standards unfairly prejudice the company, impermissibly chill the individual's right to independent counsel, and directly contravene statutes enacted by the vast

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> majority of states expressly authorizing, or even requiring, advancement of legal fees to corporate agents and employees.") (footnotes omitted); Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. L. 405, 420 (2005) ("[T]he Thompson Memorandum poses difficulties for employees who contracted for the company's payment of their legal fees in the event of a lawsuit.... Once the company is forced to withdraw its support, its employees are left to fend for themselves in any ensuing legal battles that may develop.") (footnotes omitted).

***400 * * ***

In sum, KPMG and its counsel knew from the Thompson Memorandum, even before they first communicated with the USAO, that the payment of the legal fees of KPMG employees, in the absence of a legal obligation to do so, would increase the risk of indictment of the firm, as prosecutors might view that action as protecting culpable employees. So the Court turns to the government's next contention, viz. that KPMG conditioned and then cut off payment of legal fees entirely on its own, " not cowed by" the Thompson Memorandum and the actions of the USAO.

B. The Thompson Memorandum and the USAO's Actions Caused KPMG to Limit and Then Cut Off Payment of Fees

The government argues that KPMG formulated its own policy on payment of attorneys fees-the government had nothing to do with it. "*KPMG,*" it asserts, "began the [February 25, 2004] meeting by volunteering that the firm had decided to change course and now intended to cooperate fully and completely, and later announcing its intention to ' not pay legal fees for employees who declined to cooperate with the Government,' but to pay otherwise." [FN29] In other words, "even assuming that the USAO communicated ...'that it did not want KPMG to pay legal fees,' the evidence is uncontested that KPMG, apparently not cowed by any such communication, ignored that desire and went ahead and paid the fees, subject to terms and conditions of its own devising." [FN30] The government's argument is unpersuasive.

> FN29. Govt. App. Br. at 57 (emphasis in original).
>
> FN30. *Id.*

1. The Thompson Memorandum Influenced KPMG Even Before the February 25, 2004 Meeting Took Place

As an initial matter, the contention that the Thompson Memorandum had no effect on KPMG's actions cannot be squared with the evidence or with the government's concession to this Court.

The record fully establishes KPMG's specific and entirely understandable desire to do whatever it could to come within the Thompson Memorandum's definition of a cooperative company.[FN31] As KPMG's new chief legal officer, former U.S. District Judge Sven Erik Holmes, testified in a civil deposition received in evidence in the fee hearing, he thought it indispensable "to be able to say, at the right time with the right audience, we're in full compliance with the Thompson Guidelines." [FN32] Anything less, as former Attorney General Meese told the Senate Judiciary Committee, "might well have constituted legal malpractice." [FN33] It therefore is hardly surprising that the government expressly conceded in its closing argument at the fee hearing that the Thompson Memorandum influenced KPMG's decisions on legal fees:

> FN31. Among other things, despite the fact that KPMG had entered into a severance agreement with defendant Stein that expressly obligated the firm to pay his defense costs, DX 6, ¶ 13 [SA6-7]; *Stein I,* 435 F.Supp.2d at 339, it ultimately cut off payments because, according to Joseph Loonan, then KPMG's deputy general counsel, KPMG "thought it would help [the firm] with the government."Tr., May

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9, 2006 (Loonan) 196:13-23; *see also Stein I,* 435 F.Supp.2d at 347-48. There was no evidence of anything that might have given KPMG that idea except the Thompson Memorandum and the actions of the USAO.

FN32. Stein Mem. [dkt. item 544] Ex. B, at 74-75.

FN33. Meese Senate Statement.

"[AUSA] WEINSTEIN: I don't think anybody is disputing that the Thompson memo as a whole had an influence on ***401** their [i.e., KPMG's] decisions with respect to the legal fees.

* * *

"So if we are asking whether there was an influence from the Thompson memo, of course, because the company was doing anything it could to cooperate." FN34

FN34. Tr., May 10, 2006, at 399:16-19, 400:9-11.

2. KPMG Made No Decisions Until After the February 25, 2004 Meeting

The government argues that the USAO's actions, as distinguished from the Thompson Memorandum alone, had nothing to do with KPMG's limitation and cutoff of legal fees because KPMG decided on its course before the initial February 25, 2004 meeting with the USAO. It contends, in other words, that KPMG formulated its own position, free of the USAO's influence. But there are fundamental flaws in its argument.

(a) KPMG Made No Decisions Before the Meeting Even as to Costs of Representing Employees During the Investigation

The government's challenge to the findings about the February 25 meeting rests on its assertion that "*KPMG* began the meeting by volunteering that the firm had decided to change course and now intended to cooperate fully and completely, and later announcing its intention to 'not pay legal fees for employees who declined to cooperate with the Government,' but to pay otherwise." FN35 The implication is that KPMG had made up its mind even before it first met with the USAO. But the government's account of the meeting is misleading, and its implication is incorrect.

FN35. Govt. App. Br. 57 (emphasis in original).

It is quite true, as the government argues,FN36 that KPMG's attorney, Mr. Bennett, began the meeting by saying that KPMG had decided to change course and cooperate fully. Contrary to the government's suggestion, however, those remarks were directed to KPMG's high-level personnel changes and the importance of avoiding indictment of the firm. Mr. Bennett said nothing at that point about payment of legal fees. So the implication that KPMG opened the meeting by volunteering that it had decided upon a new course with respect to payment of legal fees is incorrect. The subject of legal fees first was raised by AUSA Weddle, acting according to the plan the prosecutors made before the meeting.

FN36. *Id.* at 29.

When Mr. Weddle did raise the issue, KPMG did not initially respond by volunteering that it would pay fees only for employees who cooperated with the government. Rather, Mr. Bennett met Mr. Weddle's question with a question. He asked for the government's view on the subject.FN37 The notes of Mr. Pilchen, a Skadden Arps lawyer at the meeting, demonstrate this clearly:

FN37. Tr., May 8, 2006 (Pilchen) 23:8-12.

"Weddle-*wants p'ship agreement, bylaws.* Are u paying fees for partners/ees? Are you obligated
"RCB [Mr. Bennett]-ur view on the subject?" FN38

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FN38. K313 [A1338] (emphasis in original).

It is not difficult to see what was going on here. Mr. Bennett and KPMG well understood the Thompson Memorandum and the risk that the government would regard payment of employee legal fees as protection of culpable individuals. They thus knew that payment of legal fees for individuals could increase the risk of indictment ***402** of the firm. But refusal to pay legal fees was problematic for KPMG. The government stipulated: "Prior to February 2004, ... it had been the longstanding voluntary practice of KPMG to advance and pay legal fees, without a preset cap or condition of cooperation with the government, for counsel for partners, principals, and employees of the firm in those situations where separate counsel was appropriate to represent the individual in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee." [FN39]

FN39. *Stein I,* 435 F.Supp.2d at 340.

Moreover, as Mr. Bennett later explained to the government, departing from this practice "would be a big problem" for KPMG because the firm was a partnership.[FN40] The inference is compelling that Mr. Bennett's response to Mr. Weddle was an attempt to sound out the USAO as to whether payment of legal fees by KPMG for employees caught up in the investigation would be held against the firm.

FN40. U30 [A1146].
The implication was that management had to be at least somewhat responsive to the voting partners of the firm, many of whom might have viewed cutting off fees to their colleagues with disfavor because it would set a precedent that was a potential threat to every member of the firm.

It is undisputed also that the government gave KPMG no comfort. To the contrary, Ms. Neiman rejected Mr. Bennett's feeler, saying "that the government would take into account KPMG's legal obligations, if any, to advance legal expenses, but referred specifically to the Thompson Memorandum as a point that had to be considered." [FN41] Only then did KPMG say anything about paying legal fees only for employees who cooperated with the government, itself a partial retreat from its " common practice" of paying in all cases. Even that was a trial balloon, not the announcement of a decision. The Skadden lawyers emphasized that no decisions had been made.[FN42] But Ms. Neiman and Mr. Weddle were not favorably disposed. Ms. Neiman said that " 'misconduct' should not or cannot 'be rewarded,' " and Mr. Weddle followed up by emphasizing that any payment of legal fees would be "look[ed] at ... under a microscope." [FN43]

FN41. *Stein I,* 435 F.Supp.2d at 341.

FN42. Tr., May 8, 2006 (Okula) 79:25-80:10, 107:2-7, 124:19-23; U116, ¶ 26 [A1199]; K313 [A1338].

FN43. *Stein I,* 435 F.Supp.2d at 342-44.

Mr. Pilchen's notes show all this. After noting Mr. Bennett's comment about paying fees only for those who cooperated, they say:
"SP [Mr. Pilchen]-*No decisions made.* No counsel have been recommended. We have had discussions @ what the firm does in typical situations-but *no final decisions made.*
"SN [Ms. Neiman]-*misconduct shdn't be rewarded.*
"JW [Mr. Weddle]-*if u have discretion re fees-we'll look at that under a microscope.*" [FN44]

FN44. K313-14 [A1338-39] (italics supplied, underscoring in original).
It bears mention that Mr. Weddle never denied having made the statement.

The logical inference, and the one the Court drew and draws, is that KPMG came into the meeting

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hoping to continue its past practice of paying employee legal fees. Anything else, in Mr. Bennett's words, would have been "a big problem" because KPMG was a partnership. In view of the Thompson Memorandum, however,*403 KPMG understandably was reluctant to do so without an indication from the USAO that such payments would not be held against the firm. Ms. Neiman declined to give that indication. So KPMG tentatively suggested a possible fallback position-payment of legal fees only for employees who cooperated with the government by, among other things, waiving the Fifth Amendment-while emphasizing that it had made no decisions.[FN45] Even that, however, did not receive a warm reception from the USAO, which asked KPMG to get back to it once it determined what its obligations were,[FN46] a reference to the Thompson Memorandum's statement that payment of legal fees beyond a company's legal obligations could be viewed as a lack of "cooperation." There is no credible evidence that KPMG made any decisions at all about payment of employee legal expenses before the February 25 meeting ended.[FN47]

FN45. Indeed, Mr. Bennett tried to sell this idea to the government on the theory that it would be helpful to the prosecutors, stating that "[h]e would recommend law firms [for individual employees] that were familiar with these types of proceedings and who understood that cooperation with the government was the best way to proceed." *See* U119, ¶ 56 [A1202].

FN46. U106 [A1189].

FN47. Of course, as *Stein I* noted, Skadden representatives made statements about what they would do or were considering doing with respect to fees. But the evidence is clear, as Mr. Okula testified, that they also stated no final decision had been made. Tr., May 8, 2006 (Okula) 79:25-80:10; *see also* supra note *41.*

Mr. Bennett first got back to the government on March 2 to give what AUSA Weddle described in a contemporaneous e-mail as KPMG's "*preliminary view* on legal fees." [FN48] He said that KPMG was "planning on ... putting a cap on fees" and conditioning their payment for any given partner or employee on that individual "cooperating fully with the company and the government." [FN49] But AUSA Weddle stated under oath that Mr. Bennett told him on this occasion that no final decision had been reached.[FN50]

FN48. U30 [A1146] (emphasis added); *see also* Tr., May 8, 2006 (Okula) 89:12-90:9.

FN49. U30 [A1146].

FN50. Weddle Decl. [dkt. item 435] ¶ 3.

In short, KPMG's statements at the February 25 meeting about a possible new policy concerning legal fees were not announcements of decisions already made, let alone decisions that the firm had made free of government interference. KPMG was bidding against itself in an auction in which the Thompson Memorandum set out the rules, the USAO was both the seller and the auctioneer, and the lot on the block was avoidance of an indictment of the firm. The decisions all were made after the February 25 meeting.

(b) The Decision Not to Pay the Defense Costs of Any Employees Who Were Indicted Came Even Later

KPMG's definitive response on attorneys' fees came on March 11, 2004, when Skadden's Mr. Rauh sent the government a sample form letter to KPMG employees. The form letter stated that KPMG would pay an individual's legal fees and expenses, up to a maximum of $400,000, on the condition that the individual "cooperate with the government and .. . be prompt, complete, and truthful." [FN51] Most importantly, the letter added something new, something that had not even been mentioned at the February 25 meeting. It said that "*payment of ... legal fees and expenses will cease immediately if ... [the recipient] is* ***404*** *charged by the government*

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with criminal wrongdoing." [FN52] This was the first mention to the government, so far as the record reveals, of any intention to cut off payment of legal fees to anyone who was indicted. [FN53]

FN51. K15 [A1214].

FN52. K16 [A1215] (emphasis added).

FN53. As will appear, the very first mention of the possibility of cutting off payment of legal fees to anyone who was indicted came in a meeting at KPMG following its attorneys' first meeting with the USAO on February 25, 2004. *See infra* page 408.

The Court finds that KPMG's decision to cut off payment of any legal expenses to anyone who was indicted-which is the critical point here [FN54]-was prompted by the Thompson Memorandum and the USAO's negative reaction at the February 25 meeting to the possibility that KPMG would pay any legal fees in the absence of a legal obligation to do so. The record thus does not bear out the government's argument that KPMG, "apparently not cowed by any [indication that the government did not want KPMG to pay legal fees], ignored that desire and went ahead and paid the fees, subject to terms and conditions of its own devising." [FN55]

FN54. *Stein I* held that the constitutional violation pertinent to possible dismissal of the indictment was the government's role in KPMG's action in cutting off payment of legal fees for those who were indicted as distinct from the limitations on payment of legal fees during the investigative stage. *See*435 F.Supp.2d at 373.In *United States v. Stein,* 440 F.Supp.2d 315 (S.D.N.Y.2006) ("*Stein II* "), the Court held also that the government coerced proffers made by defendants Smith and Watson by inducing KPMG to pay pre-indictment legal fees only for employees who cooperated with the government and waived the Fifth Amendment and, in the case of Smith, threatening to fire him.

FN55. Govt. App. Br. 57.

The fact that KPMG paid legal fees of its employees and former employees during the pre-indictment investigation-as long as they did what the government asked and waived the Fifth Amendment-does not support the government. The government ultimately was perfectly happy to have KPMG do so because the threat of cutting off even those payments gave KPMG, and therefore the government, leverage over the recipients. As the government said in summation at the fee hearing: "[T]here are two ways the company could get their people in. One is they could hold over their head their job. The other is they could cut off their legal fees. If it's a former employee, the first one isn't even relevant. So regardless of whether there is a reference in the Thompson memo for legal fees, that is all the company can do to get its people in." [FN56]

FN56. Tr., May 10, 2006, at 400:2-8.

But the critical fact remains that KPMG refused to pay the fees of these defendants *after they were indicted* as a result of the Thompson Memorandum and the actions of the USAO.

The government nevertheless persists in arguing that the Court's causation finding was clearly erroneous because no one from KPMG said that the Thompson Memorandum and the USAO's actions precipitated the decision.[FN57] This argument too is unpersuasive.

FN57. Govt. App. Br. 63-66.

There was no need for direct evidence of the reasons for KPMG's decision. The evidence as a whole more than supports the Court's finding. Moreover, the government was on ample notice that the reasons that KPMG acted as it did were to be tried at the hearing.[FN58] Yet it called no witnesses to testify as to when, how, and *405 why KPMG

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made the decisions it did. The reason it did not do so is the elephant in the room that the government tries to ignore.

> FN58. The order that set the evidentiary hearing that preceded *Stein I* stated that " [t]he issues for consideration [at the hearing would be] *whether the government, through the Thompson memorandum or otherwise, affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees with respect to the investigation and prosecution of this case* and such subsidiary issues as relate thereto. " Order, Apr. 13, 2006 [dkt. item 436] 2 (emphasis added).

In a letter to the Court three days before the start of the hearing, KPMG represented:
"categorically that the Thompson memorandum *in conjunction with the government's statements relating to payment of legal fees*' affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees....' In fact, KPMG is prepared to state that the Thompson memorandum substantially influenced KPMG's decisions with respect to legal fees...." [FN59]

> FN59. Letter, Charles A. Stillman, May 5, 2006 [dkt. item 985] 3 (emphasis added).

In view of this statement, it is not surprising that the government adduced no evidence to challenge the defense contention that the Thompson Memorandum and the USAO's conduct *both* influenced KPMG's decisions on legal fees. Indeed, it did not contest the point at the fee hearing.

3. There Was Ample Evidence that KPMG Would Have Paid the Fees of Most of these Defendants Absent Government Interference

Finally, the government contends that the Court's " key finding-that KPMG would have paid the defendants[ ]' legal fees absent the Thompson Memorandum and the conduct of the USAO-is wholly belied by the evidence of record." [FN60] It suggests that the Court erred in inferring that KPMG would have paid its employees' defense costs here because KPMG had paid post-indictment defense costs in only one prior case and because the government has hypothesized other reasons why a firm in KPMG's position might have declined to pay. [FN61] But the government stipulated that KPMG had a long standing practice of paying the legal fees of its personnel "in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee." [FN62] It conceded that KPMG's legal fee decision was influenced by the Thompson Memorandum.[FN63] And there was considerably more evidence at the fee hearing than the bare words of the stipulation and the government's concession.

> FN60. Govt. App. Br. 42.
>
> FN61. *Id.* at 63-66.
>
> FN62. *Stein I,* 435 F.Supp.2d at 340.
>
> FN63. Tr., May 10, 2006, at 399:16-19.

The government ignores the fact that KPMG, as of January 27, 2004-less than a month before the February 25 meeting, entered into an express contract with defendant Stein in which it agreed to pay his defense costs in "*all* legal proceedings or actions ... brought against [Stein] arising from and within the scope of his duties and responsibilities ..." -in other words, to adhere to its prior practice.[FN64] It ignores the fact that KPMG lawyers told the government at the February 25, 2004 meeting that no decisions had been made concerning payment of legal fees. It ignores their inquiry as to the government's view and distorts their tentative suggestion of a policy to avoid dealing with the fact that these were parts of an effort to see how far ***406** KPMG could go in adhering to its prior practice and its agreement with Stein without risk to the

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firm. It ignores the fact that KPMG's lawyers told the government on February 25, 2004 that KPMG's "common practice" was to pay such fees-a statement that suggests that KPMG wished to, or at least was entertaining the possibility that it might, pay all employee defense costs in this matter. It ignores Mr. Bennett's statement that departing from its common practice of paying these expenses " would be a big problem" for KPMG because the firm was a partnership.[FN65] It ignores the fact that KPMG, in addition to paying post-indictment defense costs in a case years ago, much more recently had paid over $20 million in individual defense costs in the Xerox matter, which included a criminal investigation.[FN66] And it ignores Mr. Loonan's testimony, which strongly suggested that cost was not a factor in KPMG's decision here.[FN67] In short, the government ignores extensive evidence showing that KPMG was a partnership that historically had stood-and hoped in this case to stand-behind its partners and employees, regardless of cost and regardless of whether the exposure they faced was criminal or civil, because the nature of the firm made it "a big problem" to do anything else. And it ignores as well something else that is telling.

FN64. DX 6, ¶ 13 [SA6-7] (emphasis added).

FN65. U30 [A1146].

FN66. Tr., May 8, 2006 (Loonan) 129:23-130:18.

FN67. Mr. Loonan testified that he was present at meetings at which the change in KPMG's practice was discussed, that no one at those meetings ever expressed the view that the firm should not spend the money required to pay individuals' defense costs, and that the decision-makers' explanation of the change in policy was based on undisclosed legal advice as to which Mr. Loonan invoked attorney-client privilege. Tr., May 8, 2006 (Loonan) 137:20-143:3. Thus, Mr. Loonan essentially ruled out cost as a factor and, though clearly limited by privilege considerations in the degree of detail he gave, left the unmistakable impression that KPMG made the decision based on purely legal, not economic or other business, considerations.
KPMG's ability to pay is not in question for several reasons. First, the fee hearing specifically focused on whether KPMG would have paid these defendants' legal fees, yet the government offered no evidence of any inability on the part of KPMG to pay. Second, as noted, KPMG's Mr. Loonan testified in substance that cost was not a factor in the decision to refuse payment. Third, KPMG reported combined revenue of $16.9 billion, of which almost $6 billion was derived from the Americas, in fiscal year 2006. KPMG International Annual Review 2006 57 (2006), *available at* http:// www. kpmg. com/ NR/ rdonlyres/ 80866830- 14 B 9- 4 C 72 - B 174- 8 B 5 A 653 D 7 E 1 C/ 0/ KPMGIAR 2006v11.pdf (last visited July 13, 2007).

In a little-noticed comment at the fee hearing, KPMG's general counsel mentioned that KPMG was paying the defense costs of many of the individuals indicted in this case in civil cases relating to these tax shelters.[FN68] The circumstances and full extent of its actions, however, became clear only in response to a recent question by the Court.

FN68. Tr., May 9, 2006 (Loonan) 216:19-22, *see also* Tr., July 2, 2007, at 24:11-25:22.

It now is undisputed that KPMG has been paying the defense costs of at least eleven of the sixteen KPMG Defendants [FN69] in civil cases relating to the tax shelters here at issue and also the defense costs of eight of them in regulatory inquiries relating to the conduct in question in this case.[FN70] The precise amount of these payments to date is not of record, but it *407 exceeds $3.4 million.[FN71] Moreover, it is striking that KPMG has paid these

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costs subject to the requirement that the individuals be represented in the civil matters by attorneys who are not involved in defending this criminal case. [FN72]

FN69. The exceptions are Messrs. Greenberg, Larson, Pfaff, Rosenthal and Smith. Smith has submitted documents indicating that KPMG paid his fees also. Smith Decl. [dkt. item 1103] ¶¶ 5-8 & Ex. B.

FN70. Letter, John M. Hillebrecht, July 9, 2007 [dkt. item 1128]; *see also* Spears Decl. [dkt. item 1100] Ex. A.

FN71. Spears Decl. [dkt. item 1100] ¶ 6 & Ex. B.

FN72. Arkin Decl. [dkt. item 1088] ¶¶ 2-6 & Exs. B, C; DeLap Decl. [dkt. item 1118] ¶ 12; Letter, Diana D. Parker, July 10, 2007 [dkt. item 1131]; Gremminger Decl. [dkt. item 1083] ¶¶ 2-3; Lanning Decl. [dkt. item 1119] ¶ 3; Ritchie Decl. [dkt. item 1097] ¶¶ 2-3; Rule Decl. [dkt. item 1104] ¶¶ 5-6; Smith Decl. [dkt. item 1103] ¶ 5 & Ex. A; Watson Decl. [dkt. item 1099] ¶¶ 11-16.

The fact that KPMG is paying civil defense costs, regardless of amount, is consistent with its uniform practice over many years. What makes the criminal case different is only the Thompson Memorandum and the USAO's actions. Indeed, the fact that KPMG has been paying the civil defense costs on condition that the defendants' lawyers in those matters be different than their lawyers in the criminal case-a condition that is at war with any consideration of economy or efficiency-demonstrates with astonishing clarity that the different treatment of the criminal case defense costs has been driven from the outset by the fear that the government would view any assistance in defending against the indictment as a black mark against KPMG. KPMG cut off payment of defense costs to anyone who was indicted for one reason and one reason alone-the Thompson Memorandum and the related actions of the USAO. In their absence, KPMG would have paid every penny, just as it always had done before.

4. New Evidence that KPMG Would Have Paid Absent Government Interference

Three additional pieces of evidence-one of which was discovered only recently in the more than 22 million pages of discovery turned over to the defense, a second that was not previously of record, and the third only recently produced to the defense by KPMG-confirm the Court's finding that the Thompson Memorandum and the USAO's actions caused KPMG to change its policy, for this case only, with respect to payment of legal fees.

The first is a voicemail message on February 18, 2004-immediately after KPMG learned of the criminal referral but before the February 25 meeting with the USAO-from Gene O'Kelly, then KPMG's chief executive officer, to all partners.[FN73] It announced that the firm just had learned that the USAO would be commencing an investigation. It went on to say that "[a]ny present or former members of the firm asked to appear will be represented by competent council [sic] *at the firm's expense.*" There was no mention of conditioning KPMG's payment on cooperation, no mention of any cap on legal expenses, and no mention that the firm would stop paying in the event of indictment. The voicemail concluded by stating:

FN73. A transcript of this voicemail was produced some time ago amidst the more than 22 million documents turned over in discovery. Defendants only recently found it. Defs. Mem. [dkt. item 1010] 7 n. 14; Govt. Mem. [dkt. item 1051] 14 n. 3.

"Finally, you should expect that I and other members of leadership will work diligently to bring this matter to a successful conclusion, *provide you with all the necessary support* and keep you updated on a periodic basis. *In closing, I ask that you exhibit the resolve that you've shown*

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throughout the Xerox investigation which defines what makes us a great firm." [FN74]

FN74. Spears Decl. [dkt. item 1025] Ex. C (emphasis added).

***408** The Xerox investigation, it will be recalled, was the criminal and SEC investigation in which KPMG spent over $20 million on the individual defenses of four of its personnel.

The second relates to the contract that KPMG negotiated with Richard Smith prior to February 25 and then refused to sign. The fact of the agreement and KPMG's refusal to sign were known previously. The Court did not know previously that the Smith contract contained a clause, substantively identical to that in the Stein contract,[FN75] that explicitly would have required KPMG to pay Smith's defense costs. Nor did the Court know previously that Smith and KPMG chairman O'Kelly had scheduled a meeting for February 27, 2004 to execute it. Following the February 25 meeting between KPMG and the USAO, however, KPMG refused to sign the contract to which it had agreed.[FN76]

FN75. *Compare* Smith Aff. [dkt. item 1017], Ex. C ¶ 8, *with* DX 6, ¶ 13 [SA6-7].

FN76. Smith Aff. [dkt. item 1017] ¶¶ 1-14.

The reason for KPMG's sudden change of heart is made clear by the final piece of new evidence-recently produced notes taken by Greg Russo, a senior KPMG executive, at the meeting at which the Skadden lawyers reported back to KPMG on their February 25 meeting with the USAO.[FN77] Near the beginning of the notes, Russo wrote:

FN77. These notes were not available at the fee hearing because KPMG declined to produce them pursuant to subpoena on privilege grounds. They first were produced by KPMG on May 17, 2007. Spears Decl. [dkt. item 1025] ¶ 5.

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"-Paying legal fees	}	
	}	not a sign
"	}	of
-Severance		cooperation

" 78

FN78. Spears Decl. [dkt. item 1025] ¶ 5 & Ex. D.

After noting the nature of the possible charge against KPMG-"[c]onspiracy to defraud the U.S. Treasury"-the notes go on:

"(1) uphill battle -Neiman	}	potential
	}	action
"(2) no one has a get out of jail free card- Weddle	}	against
	}	the firm
"(3) shams-S ullivan	}"	

Near the end, the notes state:
" Attorneys fees for individuals as long as they cooperate, up to indictment w/ a cap
" Severance a problem (Smith's pending agreement)
" FN79

FN79. *Id.*

These three items of evidence sharpen the picture that emerged at the fee hearing. Mr. O'Kelly's voicemail supports the Court's finding that KPMG went into the February 25, 2004 meeting wishing to pay the defense costs of its personnel (not doing so " would be a big problem"), but apprehensive in light of the Thompson Memorandum that doing so would increase the risk that the firm would be indicted. So too does the fact that KPMG, only days before the February 25 meeting, reached an agreement with Mr. Smith on a contract that explicitly would have obligated the firm to pay his legal fees. It therefore is not surprising that Mr. Bennett on February 25 parried the prosecutors' inquiry about payment of legal fees and attempted to elicit the government's view. He did so in order to see whether KPMG could adhere to its usual practice, or something approaching it, without increasing the risk of indictment of the firm. The Russo notes,

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however, confirm that Skadden Arps reported back to KPMG after the meeting that the government was "angry," that Ms. Neiman had led Skadden to believe that avoiding an indictment of the firm would be an "uphill battle," that Mr. ***409** Weddle had stressed that "no one has a get out of jail free card," and that paying legal fees and entering into severance agreements would "not [be] a sign of cooperation." In other words, payment of legal fees and entering into severance agreements would increase the chance that KPMG would be indicted. It was only after that report that KPMG decided to (1) pay pre-indictment expenses up to $400,000 only for employees who cooperated with the government and waived the Fifth Amendment, (2) cut off legal expense payments to anyone who was indicted, and (3) make an abrupt about face and refuse to sign the Smith contract that it had agreed to only days earlier.

KPMG would have paid the legal expenses of thirteen of the defendants (and signed Smith's contract) had the government not interfered both by the Thompson Memorandum and the actions of the USAO. As will appear below, however, the Court, upon consideration of matters not previously focused upon by the parties, is not so persuaded as to three defendants.

III. The Due Process Arguments [FN80]

FN80. In *Stein I,* the Court found violations of the KPMG Defendants' Sixth Amendment and substantive due process rights. Although the parties have not raised this issue, the Court is well aware that where an Amendment "provides an explicit textual source of constitutional protection ... that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [the] claims." *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *see also Pabon v. Wright,* 459 F.3d 241, 253 (2d Cir.2006). The finding of substantive due process violations in *Stein I* constitutes an alternative holding that would be material in the event that a reviewing court disagreed with the Court's Sixth Amendment analysis.

Both sides discuss whether the government's conduct in this case shocks the conscience, a term that carries special significance in the context of substantive due process analysis. The KPMG Defendants urge that the government's inducement of KPMG's cut off of defense costs was part of a broader pattern of government misconduct that shocks the conscience and violated their right to substantive due process. They argue that this constitutes a separate constitutional violation, independent of those found in *Stein I.*[FN81] They contend further that a finding that the government's actions shock the conscience would make deterrence of future misconduct a pertinent consideration in determining the remedy and independently warrant dismissal.[FN82]

FN81. *E.g.,* Tr., July 2, 2007, at 8:2-16, 8:23-9:7.

FN82. *E.g., id.* at 16:18-17:6.

The government concedes that a finding that its actions shock the conscience is not an element of a substantive due process violation in the circumstances of this case-i.e., where there is no adequate remedy short of dismissal.[FN83] In consequence, it urges the Court not to consider defendants' argument.[FN84] But it is reasonably plain that the government's concession with respect to dismissal, whether so motivated or not, is a prelude to an appeal. It therefore is appropriate for the Court to ***410** consider the defendants' argument because it may prove significant to a reviewing court.

FN83. *E.g., id.* at 85:12-90:6.

FN84. As will appear, the Court agrees with the government's conclusion that a finding that its actions shock the conscience is not indispensable here. It finds the government's rationale for its position,

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however, illogical, as it appears to confuse the question whether there was a constitutional violation with the availability of particular remedies.

FN84. Govt. Mem. [dkt. item 1051] 11 (" [G]iven that the Court has already held that the Government has violated the Fifth and Sixth Amendment rights of the defendants, and given that neither the Government nor the defense has been able to suggest a remedy that addresses the violation as defined by the Court, we respectfully submit that the Court need not consider the defendants' arguments as to outrageous misconduct.")

A. The KPMG Defendants' Pattern Argument

The KPMG Defendants argue that the government not only coerced KPMG into cutting off payment of legal fees, but improperly coerced some of them to make statements to prosecutors, coerced KPMG into admitting to an unduly one-sided Statement of Facts as part of the deferred prosecution agreement, improperly joined nineteen defendants in a single indictment and resisted any severance for the purpose of coercing guilty pleas by the threat of an unmanageable and costly trial, and dissembled to the Court in the fee proceedings.[FN85]

FN85. Defs. Mem. [dkt. item 1010] 7-23. The KPMG Defendants, on the basis of documents that only recently have come to light, maintain also that the Internal Revenue Service and the Department of Justice engaged in improper and possibly criminal misconduct by disclosing and receiving, respectively, tax return information in violation of 26 U.S.C. § 6103. *See* Smith Reply [dkt. item 1075] 4-15. As this contention first was raised in their reply papers, the Court is treating that contention as a separate motion and has established a separate briefing schedule.

The Court already has ruled on certain elements of this argument. In its decision on certain defendants' motions to suppress, the Court found that the government improperly used its leverage over KPMG to induce KPMG to coerce proffers by certain defendants.[FN86] It found previously that the USAO was "economical with the truth" in its effort to avoid an evidentiary hearing on the defendants' motion with respect to the fee issues. [FN87] From a factual perspective, nothing else need be said on these points.

FN86. *See Stein II,* 440 F.Supp.2d 315. The Court concluded that the government was guilty of improper pressure with respect to all nine moving defendants. It denied suppression as to seven, however, on the ground that those defendants had failed to establish that they would not have proffered without regard to the pressure exerted by KPMG at the government's instigation. *Id.* at 326-30, 333.

FN87. *Stein I,* 435 F.Supp.2d at 381.

The argument concerning the Statement of Facts is, at least in part, a recycling of an argument previously rejected.[FN88] In summary, it boils down to the contention that the government largely dictated the terms of the Statement of Facts to which KPMG was forced to assent in order to avoid indictment, while at the same time forbidding KPMG from conducting an internal investigation to determine exactly what had transpired. The government, the argument goes, did so, at least in some degree, because it wanted to use the extensive admissions of wrongdoing that it demanded against "taxpayers and other professional service providers, such as E & Y [Ernst & Young], Sidley [Austin LLP and] Deutsche Bank." [FN89]But this would add little if anything to the KPMG Defendants' position, even if it were entirely accurate, a point the Court need not reach. For even if the government's actions vis-a-vis the Statement of Facts were reprehensible, they would not have affected these defendants.

FN88. *United States v. Stein,* No. S1 05

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Crim. 0888(LAK), 2006 WL 1063295 (S.D.N.Y. Apr. 5, 2006).

FN89. Spears Decl. [dkt. item 1025] Ex. N, at 4.

The argument concerning the government's tactics with respect to joinder and severance has substance to the extent that it now seems that the government never expected or intended to try together anything approaching the nineteen defendants named in the indictment.[FN90] It mistakenly ***411** expected a substantial number of guilty pleas. Nevertheless, the government until very recently stoutly resisted any severance, a course that, as defendants argue, may have increased the pressure on them to enter guilty pleas. Defendants therefore impute to the government a motive to coerce guilty pleas. But this argument is readily answered.

FN90. Tr., Oct. 3, 2006, 43:15-44:10, 48:8-12; Govt. Mem. [dkt. item 745] 1-2.

While the return of indictments with so many defendants is not favored, [FN91] it is not forbidden. Common experience, moreover, teaches that the vast majority of criminal defendants plead guilty regardless of the number of individuals included in the instruments in which they are charged. On the face of it, the government's joinder of these nineteen defendants and its opposition to severance, which always were subject to the Court's power to grant a severance if that were warranted, cannot be faulted. In the absence of evidence that the joinder and the government's litigation posture were specifically intended to pressure individuals to enter guilty pleas, the Court finds no impropriety notwithstanding that the government's tactics perhaps were ill-advised.

FN91. *See United States v. Casamento,* 887 F.2d 1141, 1151-52 (2d Cir.1989).

In the last analysis, then, the KPMG Defendants' contention that the government has engaged in a conscience-shocking pattern of misconduct stands or falls on the findings that the Court made in *Stein I* and *Stein II:* that the government improperly coerced KPMG into refusing to pay the KPMG Defendants' defense costs, was less than candid with the Court in its effort to avoid a hearing on that issue, and improperly used KPMG to coerce proffers from KPMG personnel.

B. The Legal Standard

[1][2] The substantive component of the Due Process Clause protects the individual against "the [government's] exercise of power without any reasonable justification in the service of a legitimate governmental objective." [FN92] In *County of Sacramento v. Lewis,* the Supreme Court held that " criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." [FN93] Where the challenged government action is legislation, the question is whether a fundamental liberty interest was infringed and, if so, whether the legislation survives strict scrutiny. Where, however, the challenged government action is the conduct of a particular government employee or official, *County of Sacramento* held that the question is whether the conduct "shocks the conscience." [FN94]

FN92. *County of Sacramento v. Lewis,* 523 U.S. 833, 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

FN93. *Id.* at 846, 118 S.Ct. 1708.

FN94. *Id.* at 846-47, 118 S.Ct. 1708.

It is not clear that the Supreme Court still adheres to the *County of Sacramento* framework.[FN95] The Second Circuit has ***412** done so in some cases and, it appears, departed from it in others.[FN96] Given the uncertainty, it is appropriate to consider the substantive due process question under the *County of Sacramento* rubric notwithstanding the parties' agreement that a finding that the government's actions shock the conscience is not essential to the conclusion that the government violated the defendants' rights to substantive due process.

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FN95. In *Chavez v. Martinez,* 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), the plaintiff brought a § 1983 suit against a police officer for coercive interrogation methods. Although a majority of the Court did not reach the merits of plaintiff's substantive due process claim, Justice Thomas, in an opinion joined by the Chief Justice and Justice Scalia, analyzed the claim under both the " shocks the conscience" test and the fundamental liberty interest test. *Id.* at 774-76, 123 S.Ct. 1994. Justice Stevens, in a separate opinion, also identified the two tests as alternative means for analyzing a substantive due process claim and noted that "unusually coercive police interrogation procedures" had been found often to violate the second standard. *Id.* at 787, 123 S.Ct. 1994. Finally, Justice Kennedy, in an opinion joined by Justices Stevens and Ginsburg, stated that "use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person." *Id.* at 796, 123 S.Ct. 1994; *see also Conn v. Gabbert,* 526 U.S. 286, 291-92, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999) (analyzing substantive due process claim against prosecutors' conduct without reference to "shocks the conscience" test).

FN96. *Compare Pabon v. Wright,* 459 F.3d at 250-51; *O'Connor v. Pierson,* 426 F.3d 187, 202-03 (2d Cir.2005), *with Poe v. Leonard,* 282 F.3d 123, 137-39 (2d Cir.2002) (finding substantive due process violation for police officer conduct sufficiently alleged where officer's conduct infringed fundamental right to privacy and, "independently," because officer's conduct shocked the conscience); *Kia P. v. McIntyre,* 235 F.3d 749 (2d Cir.2000) (analyzing substantive due process claim against social worker's action without reference to "shocks the conscience" test).

Stein I discussed two closely related matters: the Thompson Memorandum itself and the actions of the USAO. The Thompson Memorandum in substance was a regulation.[FN97] The Second Circuit has held that regulations fall into the legislative category.[FN98] In consequence, a substantive due process challenge to the Thompson Memorandum properly is analyzed first by determining whether it impinged upon a fundamental right and, if it did, by then considering whether it was narrowly tailored to serve a compelling governmental interest. *Stein I* employed exactly this analysis and thus conformed precisely to *County of Sacramento* and its Second Circuit progeny.[FN99] It is unnecessary to consider whether the Thompson Memorandum shocked the conscience.

FN97. It was a Justice Department policy binding on United States Attorneys. *Stein I,* 435 F.Supp.2d at 338.

FN98. *Leebaert v. Harrington,* 332 F.3d 134, 140 & n. 2 (2d Cir.2003) (applying the fundamental right standard to a regulation, noting "[w]e read *Sacramento* to apply broadly to governmental regulation and not to be limited to legislation") (citing *Immediato v. Rye Neck School Dist.,* 73 F.3d 454, 460-61 (2d Cir.1996)).

FN99. *See Stein I,* 435 F.Supp.2d at 362-65 & n. 170.

Stein I concluded also that individual AUSAs unjustifiably acted in a manner that improperly impinged on the KPMG Defendants' right to fairness in the criminal process.[FN100] Given the relationship between their actions and the Thompson Memorandum,[FN101] the Court sees their conduct as more analogous to regulatory action than to the action of an individual officer reacting to an unanticipated situation. In consequence, the analysis in *Stein I* is sufficient to conclude that their actions were part and parcel of the deprivation of the KPMG Defendants' rights to substantive due process that was inherent in the Thompson Memorandum. Nevertheless, the Court recognizes that this perhaps is unfamiliar ground

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and that a determination whether their actions independently shock the conscience in the constitutional sense may prove significant for one or more purposes.

FN100. *Id.* at 365.

FN101. *See id.* at 365 ("The individual prosecutors in the USAO acted pursuant to the established policy of the DOJ as expressed in the Thompson Memorandum.").

C. The Actions of the USAO "Shock the Conscience"

The "shocks the conscience" standard, sometimes referred to as the "outrageous ***413** government conduct" standard, is "necessarily imprecise." [FN102] Justice Scalia has criticized it as being the " *ne plus ultra...* of subjectivity." [FN103] Nevertheless, it remains a part of our constitutional jurisprudence.

FN102. *O'Connor v. Pierson,* 426 F.3d 187, 203 (2d Cir.2005).

FN103. *County of Sacramento,* 523 U.S. at 861, 118 S.Ct. 1708 (Scalia, J., concurring in judgment).

[3] At the extremes, the test is comparatively easy of application. "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process" while "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." [FN104] The closer questions occur between these extremes-where government officials act neither for the purpose of inflicting injury nor negligently.

FN104. *Id.* at 849, 118 S.Ct. 1708.

In this case, the USAO pressured KPMG to withhold payment of legal fees. As *Stein I* found, the prosecutors understood "that the threat inherent in the Thompson Memorandum, coupled with their own reinforcement of that threat, was likely to produce exactly the result that occurred-KPMG's determination to cut off the payment of legal fees for any employees or former employees who were indicted and to limit and condition their payment during the investigative stage." [FN105]

FN105. 435 F.Supp.2d at 365.

The actions of the prosecutors with respect to legal fees may be considered also in light of their actions with respect to obtaining proffers from KPMG employees under suspicion, all of whom had a Fifth Amendment right to decline to speak to the government. The prosecutors knew that the Thompson Memorandum effectively compelled KPMG to make its personnel available for interviews by the government. They knew, as the government said at the fee hearing, that "there are two ways the company could get their people in. One is they could hold over their head their job. The other is they could cut off their legal fees." They therefore understood that KPMG would threaten to fire or cut off payment of legal fees for employees and former employees whom prosecutors reported were not cooperating-i.e., who were refusing to submit to interviews with the government.[FN106] Yet the prosecutors ***414** identified such persons to KPMG anyway. These actions are significant not only in themselves, but also for the insight they provide into the prosecutors' actions with respect to payment of legal fees. For they demonstrate a willingness by the prosecutors to use their life and death power over KPMG to induce KPMG to coerce its personnel to bend to the government's wishes notwithstanding the fact that the Constitution barred the government from doing directly what it forced KPMG to do for it.

FN106. In summing up following the fee hearing, government counsel said:
"I don't think anybody is disputing that the Thompson memo as a whole had an influence on their decisions with respect to

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> the legal fees. They have couched it in reference to, the reference to legal fees in the Thompson memo versus under the Thompson memo, or any guidelines frankly, whether the Thompson memo was there or not, if a company wants to attempt to cooperate as opposed to be charged, one of the things they needed to do is get their people in to give the information. The company can't talk, only the people can talk.
>
> "Whether or not the Thompson memo made reference to legal fees, *there are two ways the company could get their people in. One is they could hold over their head their job. The other is they could cut off their legal fees. If it's a former employee, the first one isn't even relevant. So regardless of whether there is a reference in the Thompson memo for legal fees, that is all the company can do to get its people in.*" Tr., May 10, 2006, at 399:17-400:8 (emphasis added).
>
> What the government admitted with respect to the Thompson Memorandum applies equally to the actions of the AUSAs in (1) telling KPMG, with respect to payment of legal fees, that misconduct should not be rewarded and that any such action would be looked at "under a microscope" and (2) reporting to KPMG the identities of KPMG employees who declined to make statements to prosecutors or whose responses to such "requests" did not meet with prosecutors' approval.

[4] Just as prosecutors used KPMG to coerce interviews with KPMG personnel that the government could not coerce directly, they used KPMG to strip any of its employees who were indicted of means of defending themselves that KPMG otherwise would have provided to them. Their actions were not justified by any legitimate governmental interest. Their deliberate interference with the defendants' rights was outrageous and shocking in the constitutional sense because it was fundamentally at odds with two of our most basic constitutional values-the right to counsel and the right to fair criminal proceedings.

But the Court does not rest on this finding alone. It would reach the same conclusion even if the conduct reflected only deliberate indifference to the defendants' constitutional rights as opposed to an unjustified intention to injure them.

The question whether deliberately indifferent government conduct is outrageous or shocking depends on the circumstances.[FN107] In a high-speed police chase, for example, an officer has but a moment to decide how to respond. In that context, an officer's conduct "shocks the conscience " only if there is an actual intent to cause harm, principally because there is no time for sober reflection on the possible consequences of the officer's actions.[FN108] To take another example, a governmental actor's thoughtful choice between equally compelling competing obligations is unlikely to be shocking. "In the apparent absence of harmless options at the time decisions must be made, an attempt to choose the least of evils is not itself shocking." [FN109]

> FN107. *County of Sacramento,* 523 U.S. at 850, 118 S.Ct. 1708 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another.").
>
> FN108. *Id.* at 853-54, 118 S.Ct. 1708.
>
> FN109. *Lombardi v. Whitman,* 485 F.3d 73, 82 (2d Cir.2007).

Conversely, where a government agent has "time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations," deliberate indifference to a person's rights can be shocking. [FN110] As the Second Circuit has noted, "*County of Sacramento* strongly suggests that in those circumstances when actual deliberation is possible, a showing of deliberate indifference will establish Fourteenth Amendment liability." [FN111]

> FN110. *County of Sacramento,* 523 U.S. at 853, 118 S.Ct. 1708.

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FN111. *Pabon v. Wright,* 459 F.3d at 251.

In this case, the AUSAs had ample time for deliberation and in fact deliberated before acting. They met privately before the February 25, 2004 meeting with KPMG and decided to inquire as to whether KPMG intended to pay legal fees of its personnel. It is entirely likely, and the Court finds, that they then decided the substance of their intended reaction to KPMG's possible responses. Nevertheless, they made clear that any discretionary payment of legal fees by KPMG would be looked at "under a microscope" and responded to a comment concerning payment of legal fees by emphasizing that misconduct should not be rewarded-threats if ever there were any.

***415** In any case, KPMG made clear when it left the meeting that it had made no decisions concerning legal fees and did not get back to the government even with its preliminary view until March. The AUSAs therefore had even more time-time in which to reflect upon what had transpired at the meeting and to make the USAO's views entirely clear if any ambiguity or misimpression had been left at the meeting. They easily could have called KPMG and said, for example, that payment of legal fees would not affect the USAO's view of whether to indict KPMG unless it became clear that it was part of a scheme to obstruct the investigation-the view they claim to have held of when consideration of payment of legal fees would have been appropriate in deciding when to indict a business entity. But they did not. Nor did they tell KPMG in March, when its lawyers called to convey the firm's decision on payment of legal fees, that KPMG had gone further than the government thought was necessary or appropriate. They did not do so because they did not want KPMG to assist its employees. Indeed, AUSA Okula frankly admitted that he did not think KPMG should pay for attorneys for its personnel.[FN112]

FN112. "Q. So as you went into the meeting, it was your view that if they had discretion, they shouldn't pay the fees to the subjects. Is that right? A. My personal view? Yes." Tr., May 8, 2006 (Okula) 69:1-4.

The government's actions with respect to legal fees were at least deliberately indifferent to the rights of the defendants and others. In all the circumstances, this behavior shocks the conscience in the constitutional sense whether prosecutors were merely deliberately indifferent to the KPMG Defendants' rights or acted more culpably.

IV. The Impact on the KPMG Defendants

A. Deprivation of Counsel of Choice

It now is clear, and the Court finds, that four defendants have been deprived of counsel of their choice, quite apart from any other consequences of the government's actions.

As an initial matter, the government does not dispute that defendants Hasting and Watson engaged counsel prior to indictment, wished to be defended by those attorneys after indictment, but were forced to terminate these attorneys following or on the eve of indictment because KPMG cut off payment of their legal fees and these defendants could not otherwise afford them.[FN113]

FN113. Hasting Am. Decl. [dkt. item 1046] at 2; Watson Decl. [dkt. item 1009] ¶¶ 2-12.

Mr. Gremminger's position is virtually identical. While he still was employed by KPMG, he hired the Jones Day firm. KPMG paid the fees until Mr. Gremminger was told by the USAO that he had become a target of the investigation, at which point KPMG fired him effective immediately and reneged on a previous promise to pay the severance package to which he was entitled as a KPMG partner,[FN114] just as KPMG had reneged on Mr. Stein's contract and refused to sign the contract that it had agreed upon with Mr. Smith. At that point, Jones Day " was far too expensive" for Mr. Gremminger, so he replaced it with his present counsel (at approximately half the hourly rate).[FN115]

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FN114. Gremminger Decl. [dkt. item 1110] ¶¶ 3-4, 7.

FN115. *Id.* ¶ 7.

Mr. Ritchie is in a comparable but slightly different position. In 2004, he retained Cadwalader Wickersham & Taft ("CWT") to defend him in the government's investigation.[FN116] Once the indictment*416 was returned, he wished to continue the services of CWT through trial.[FN117] He hired also Arguedas, Cassman & Headley, a much smaller firm, as co-counsel.[FN118] KPMG's refusal to pay his defense costs, however, left him with insufficient resources to pay both firms despite the fact than another employer is advancing half of his legal expenses. Accordingly, he terminated CWT.[FN119] He now is represented only by the Arguedas firm and a solo practitioner.

FN116. Ritchie 2d Supp. Decl. [dkt. item 1113] ¶ 5.

FN117. *Id.* ¶ 10.

FN118. *Id.* ¶ 12.

FN119. *Id.* ¶¶ 13-15.

Mr. Greenberg makes a similar claim. He initially was represented by Arent Fox LLP and after indictment retained also the New York office of Goodwin Procter as well as a trial attorney from Denver, Pamela Mackey. He ultimately decided in light of the expense, he says, to terminate both Arent Fox and Ms. Mackey and avers that he would not have done so if KPMG had been funding his defense.[FN120]

FN120. Greenberg Decl. [dkt. item 1120] ¶ 16.

Mr. Greenberg resigned from KPMG in February 2003, effective August 31, 2003, and gave KPMG a release.[FN121] While he requested in 2004, after retaining Arent Fox, that KPMG pay his legal fees, KPMG immediately refused.[FN122] He first retained Ms. Mackey after he was indicted in 2005.[FN123] He terminated Arent Fox as counsel on or about February 13, 2006, [FN124] more than four months after he was indicted and after Arent Fox lost a motion to release Mr. Greenberg on bail.[FN125] Thus, Mr. Greenberg first hired Ms. Mackey after he knew that KPMG would not pay his fees and continued the services of Arent Fox for more than a year after KPMG made its intentions toward him plain. Moreover, the termination of Arent Fox may well have been a product of its loss of the bail application. In all the circumstances, the Court is not persuaded that Mr. Greenberg was deprived of counsel of his choice by the government's actions.[FN126]

FN121. Pitofsky Decl. [dkt. item 763] Ex. B, ¶¶ 1, 8

FN122. Letter, Margaret Garnett, June 26, 2007 [dkt. item 1123].

FN123. Greenberg Decl. [dkt. item 1120] ¶ 16.

FN124. Price Decl. [dkt. item 359] ¶ 10.

FN125. *United States v. Stein,* No. S1 05 Crim. 0888(LAK), 2005 WL 3071272 (S.D.N.Y. Nov. 15, 2005).
Mr. Greenberg was released on bail pursuant to a subsequent application. The reply memorandum in support of his motion [dkt. item 344] was not signed by Arent Fox.

FN126. Mr. Stein also claims that he was deprived of his counsel of choice, asserting that KPMG's repudiation of his contract was among the factors that led him to decide to replace the lead counsel he initially chose with his present attorney. Stein Decl. [dkt. item 1121] ¶ 12(e). In view of the equivocal nature of the assertion and the Court's conclusion that the indictment should be dismissed as to Mr. Stein for another reason, it is unnecessary to determine this point.

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B. The Other Practical Consequences

None of the other KPMG Defendants claims to have been deprived of counsel of his or her choice. That is not to say, however, that the government's actions have not impacted the ability of any of them to defend themselves. In order to appreciate that impact, it first is necessary to understand the exceptional demands that this case places on the defendants.

1. The Scope and Nature of this Case

(a) Discovery

The volume of documents produced by the government in this case is enormous. *417 By November 11, 2006, it had turned over more than 22 million pages of material either in electronic or tangible form,[FN127] and production has continued through recent months.[FN128] This volume is large even when compared to other complex, white collar prosecutions.[FN129] Moreover, the discovery continues. Despite an October 2005 discovery deadline, over 1 million pages have been produced since June 1, 2007, [FN130] and it appears that the end has not been reached.[FN131]

FN127. Lefcourt Aff. [dkt. item 821] ¶¶ 4-5 (15 million pages produced by June 20, 2006 and more than 7 million additional pages produced by November 11, 2006).

FN128. Madigan Decl. [dkt. item 1007] ¶ 5.

FN129. *See* Defs. Mem. [dkt. item 1010] 26 n. 32.

FN130. Letter, George D. Niespolo, July 6, 2007 [dkt. item 1133]; *see also* Glavin Decl. [dkt. item 1051] ¶¶ 2-3.

FN131. Tr., Dec. 20, 2006, at 6:6-24.

To be sure, a good deal of this material has been produced in the form of digital files produced by optical scanning of physical documents. While this in theory might have been very helpful, three circumstances have lessened its utility.

First, the electronic production has been made in various formats and, to some extent, in the form of separate hard drives containing multiple databases. Defendants thus have been forced either to combine all of this material into a single data base to permit single searches of the entire electronic production or to conduct multiple identical searches in different databases.[FN132]

FN132. Lefcourt Aff. [dkt. item 821] ¶ 20; Anderson Decl. [dkt. item 561] ¶ 16; Guthrie Decl. [dkt. item 562] ¶¶ 7-9.

Second, the optical character recognition ("OCR") technology used to convert physical documents into electronic images has significant limitations. It does not recognize handwriting, and it often does not produce a usable electronic image if the physical source document is of poor quality, as for example in the case of a poor copy. While these problems can be remedied with human input, the process is time consuming and, on this scale, either extremely costly or impracticable.[FN133]

FN133. Anderson Decl. [dkt. item 561] ¶ 25; Guthrie Decl. [dkt. item 562] ¶ 16.

Third, there have been numerous technical problems with the electronic materials produced by the government. These have included incorrect descriptive information, inactive links to documents, multiple copies of single documents, and poor quality disks requiring additional labor to render them searchable.[FN134]

FN134. Lefcourt Aff. [dkt. item 821] ¶ 21; Anderson Decl. [dkt. item 561] ¶¶ 17-20; Ma Aff. [dkt. item 622] ¶ 5.

In addition, it bears noting that the documents

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produced in tangible form occupy hundreds of boxes that are available only in a warehouse or by purchasing copies at great expense.[FN135]

FN135. Rule Decl. [dkt. item 1018] ¶ 7; Anderson Decl. [dkt. item 561] ¶¶ 45-66.

The Court recognizes that the government recently and commendably agreed to build, at its expense, a searchable electronic database containing many of the documents that have been produced in discovery for use by the defendants. Although this comes very late in the day and will be subject to substantial limitations, it doubtless will be of some help. But it will not come close to eliminating the difficulties of dealing with a case in which there are over 22 million documents. Nor does it address the facts that many defendants lack the resources to pay their counsel to review many of the documents and that it will not ***418** address the need to access the paper documents.[FN136]

FN136. *See* Rule Decl. [dkt. item 1018] ¶ 9.

(b) Motion Practice

The Court commented long ago that defendants in the opening stage of this case filed 26 motions supported by memoranda of law totaling approximately 1,100 pages.[FN137] Intensive motion practice has continued since then. The full scope is apparent from the docket sheet. An indication lies in the fact that Westlaw contains twenty-four decisions in this case.

FN137. *United States v. Stein,* 424 F.Supp.2d 720, 723 (S.D.N.Y.2006).

(c) Trial

As previously noted, the government has designated nearly 70 witnesses and 2,000 exhibits totaling more than 150,000 pages for its case in chief.[FN138] It estimates that presentation of its case-in-chief will take approximately four months. The anticipated overall length of the trial is between six and eight months.[FN139]

FN138. Govt. Mem. [dkt. item 745] at 5; Kaley Decl. [dkt. item 1001] ¶ 4; Tr., Mar. 12, 2007, at 16:10-17.
The regular trial exhibits amount to approximately 36,000 pages. The government intends to offer an additional 126,000 pages as containing the data included in summary exhibits. Tr., Mar. 12, 2007, at 16:10-17; *see*FED.R.EVID. 1006.

FN139. Tr., Jul. 13, 2006, at 134:3-4, 135:5-15.

(d) Subject Matter

Finally, it must be noted that the subject matter of the case presents unusual challenges.. The nature of the tax shelter transactions, the transactional documents, and the tax law that is pertinent to the case all are extremely complex.[FN140] It is difficult to imagine an attorney whose expertise is trial practice properly defending this action without the active participation of a tax specialist steeped in the kinds of transactions at issue here. The need for trial counsel to understand this difficult material will greatly add to the cost of preparing for trial.

FN140. A modest indication of the complexity of the tax shelters involved in this case is *Klamath Strategic Inv. Fund, LLC v. United States,* 472 F.Supp.2d 885 (E.D.Tex.2007), which involved only certain aspects of one of the types of transactions involved here and did so only from the perspective of the taxpayer.

2. The Limitations on the Defense

All of the KPMG Defendants as to whom the government concedes dismissal to be the proper remedy say that KPMG's refusal to pay their post-indictment legal fees has caused them to restrict the activities of their counsel, limited or

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precluded their attorneys' review of the documents produced by the government in discovery, prevented them from interviewing witnesses, caused them to refrain from retaining expert witnesses, and/or left them without information technology assistance necessary for dealing with the mountains of electronic discovery.[FN141] The government has not contested these assertions. The Court therefore has no reason to doubt, and hence finds, that all of them *419 have been forced to limit their defenses in the respects claimed for economic reasons and that they would not have been so constrained if KPMG paid their expenses subject only to the usual sort of administrative requirements typically imposed by corporate law departments on outside counsel fees. [FN142]

FN141. Niespolo Decl. (Bickham) [dkt. item 1003] ¶ 4 (adopting statements of counsel for DeLap); Wing Aff. (DeLap) [dkt. item 1011] ¶ 4; DeLap Decl. [dkt. item 1118] ¶¶ 15-17; Arkin Decl. (Eischeid) [dkt. item 1117] ¶¶ 13-18; Kaley Decl. (Gremminger) [dkt. item 1001] ¶¶ 6-7; Gioiella Decl. (Hasting) [dkt. item 1095] at 3-4; Madigan Decl. (Lanning) [dkt. item 1091] ¶ 17; Ritchie Decl. [dkt. item 1014] ¶ 3; Ritchie 2d Supp. Decl. [dkt. item 1113] ¶¶ 10, 15; Rosenthal Aff. [dkt. item 1116] ¶ 8; Rosenthal Aff. [dkt. item 1045] ¶ 8; Rule Decl. (Smith) [dkt. item 1018] ¶¶ 9-10, 12; Smith Decl. [dkt. item 1108] ¶¶ 15-16; Spears Decl. (Stein) [dkt. item 1071] ¶¶ 13-24; DeVita Decl. (Warley) [dkt. item 998] ¶ 5; Watson Decl. [dkt. item 1009] ¶¶ 21-26; DePetris Decl. (Wiesner) [dkt. item 1064] ¶¶ 6-7; Wiesner Decl. [dkt. item 1109] ¶ 5.

FN142. *See* Tr., May 8, 2006 (Loonan) 128:18-130:18.

V. The Remedy

[5] Dismissal of an indictment on the grounds of prosecutorial misconduct is an "extreme and drastic sanction" [FN143] that should not even be considered unless it is otherwise "impossible to restore a criminal defendant to the position that he would have occupied" but for the misconduct.[FN144] Moreover, "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." [FN145] Notwithstanding the government's current position that the case should be dismissed as to thirteen defendants, the Court therefore is obliged to consider independently whether dismissal now is appropriate and, if so, whether that remedy is appropriate as to each defendant. It is necessary to deal first, however, with a preliminary matter.

FN143. *United States v. Rubio,* 709 F.2d 146, 152 (2d Cir.1983) (internal quotation marks omitted); *see also United States v. Morrison,* 449 U.S. 361, 365-66 & n. 3, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) (citing *United States v. Blue,* 384 U.S. 251, 255, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966)); *United States v. Estrada,* 164 F.3d 619, 1998 WL 716074, at *2 (2d Cir.1998); *United States v. Fields,* 592 F.2d 638, 647-48 (2d Cir.1978), *cert. denied,*442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979).

FN144. *United States v. Artuso,* 618 F.2d 192, 196-97 (2d Cir.) (quoting *United States v. Fields,* 592 F.2d at 647-48),*cert. denied,*449 U.S. 879, 101 S.Ct. 226, 66 L.Ed.2d 102 (1980).

FN145. *United States v. Morrison,* 449 U.S. at 364, 101 S.Ct. 665.

A. The Government's CJA Argument

The government's memorandum states that it " previously argued ... [that], to the extent that a given defendant establishes that he has suffered actual prejudice, in that he or she lacks sufficient funds to adequately defend the case, the appropriate remedy is an application under the Criminal Justice Act [" CJA"]." [FN146] It nevertheless concedes that dismissal is the appropriate remedy with respect to

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thirteen of the KPMG Defendants, assuming that *Stein I* stands. These positions appear to be inconsistent. Although the government does not expressly seek to reconcile them, the implication seems to be that the Court previously rejected a government contention that appointment of counsel under the CJA would be the appropriate remedy for the constitutional violations and, given that rejection, that dismissal is the only remaining option.

FN146. Govt. Mem. [dkt. item 1051] 6 (citing Govt. Mem. [dkt. item 873] 6-7).

The government is incorrect in suggesting that the Court has passed on this argument. What occurred was this. The KPMG Defendants argued, among other things, that the Court should order that the government pay defendants' legal fees out of the fines that KPMG paid and, at that time, still owed to the government pursuant to its deferred prosecution agreement. The government responded that the Court lacked statutory authority to do so and that the remedy that the defendants had suggested was not authorized by the CJA.[FN147] It did not argue that appointment of CJA counsel would be the appropriate remedy if the Court found *420 constitutional violations, so the Court had no occasion to pass on that question.[FN148] Nevertheless, it will do so now.

FN147. Govt. Supp. Mem. [dkt. item 459] 19-21.

FN148. In response to a motion to withdraw by counsel for Mr. Hasting, the government asserted that the CJA would provide appropriate relief if Hasting could not afford to pay defense counsel. It did not, however, suggest that this was an appropriate remedy for the constitutional violation. *See* Govt. Mem. [dkt. item 873] 6-7.

We begin by focusing on the precise issue raised by this suggestion. The constitutional violation here was the government's improper interference with the payment of the KPMG Defendants' defense costs. The question therefore is whether the availability of CJA appointments for defendants who have or will become financially eligible would place those defendants in the position they would have been in had the government not interfered.

Had KPMG not changed its policy on payment of defense costs in response to the government's threats, the KPMG Defendants would have had their legal fees and related expenses paid by KPMG. The overall cost would not have been an issue.[FN149] Among other things, KPMG, as noted, not long ago paid over $20 million in defense costs for four partners involved in the Xerox matter.

FN149. *Supra* note 66.

There are important differences between the position the KPMG Defendants would have occupied had KPMG paid and the positions they now are in.

First, CJA funds may be expended only on behalf of financially eligible persons.[FN150] The Court's plan for the administration of the CJA makes eligibility turn on whether an applicant's "net financial resources and income are insufficient to enable the person to obtain qualified counsel," a determination to be made with regard to "the cost of providing the person and his or her dependents with the necessities of life." [FN151] While this does not require a showing of indigency,[FN152] the retention of assets in excess of those essential to provide "the necessities of life" would be disqualifying. Thus, a defendant who is not financially eligible at the outset of a criminal prosecution must spend down his or her assets in order to qualify under the CJA. A CJA appointment for any defendant who had material resources at the date of indictment therefore would not be the equivalent of what that defendant would have had absent the government's interference with KPMG.

FN150. 18 U.S.C. § 3006A(a).

FN151. United States District Court, Southern District of New York, *Revised*

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Plan for Furnishing Representation Pursuant to the Criminal Justice Act (effective Oct. 1, 2005) (the "Plan") § VI(A).

FN152. *E.g., United States v. Parker,* 439 F.3d 81, 96 (2d Cir.2006).

Second, the CJA establishes a $7,000 maximum fee for the representation of felony defendants.[FN153] While the Chief Judge of the Court of Appeals or his designee may and, in more routine cases, generally does approve higher fees, upon certification by the district judge of their necessity, any such request must be justified.[FN154] Although this Court would certify that this case is extended and complex and the Circuit surely would agree, the large financial demands that this case could place on the funds available would create a risk that the activities of CJA-appointed counsel would be restricted.[FN155] Counsel aware of that ***421** possibility might well limit their activities to avoid the risk of non-payment. This too would compare unfavorably with the defendant's situation if KPMG were paying the defense costs in accordance with its prior practice, as it would have done absent government interference.[FN156]

FN153. 18 U.S.C. § 3006A(d)(2).

FN154. Plan § IX(B).

FN155. The Court has been advised by the Administrative Office of United States Courts that this district's total expenditures for CJA counsel in recent years have been significantly lower than $20 million per year.

FN156. Nor would recourse to the CJA be equivalent as respects the defendants' interests in choosing their own counsel. Were the Court to relieve their present attorneys and appoint others, defendants would be deprived of counsel of their choosing. Were it to exercise its power to appoint their present attorneys over their attorneys' objections, as it has done in one recent case, *United States v. Stein,* 488 F.Supp.2d 370 (S.D.N.Y.2007), there almost inevitably would be tension borne of the understandable desire of counsel who ordinarily charge far higher rates than the maximum permitted under the CJA to minimize the time devoted to these clients' defenses.

Thus, availability of CJA appointments to financially eligible defendants could not fully remedy the damage done by the government's actions. It would not prevent defendants from being wiped out financially simply by the fact of the indictment, something that would not have occurred had the government not coerced KPMG into cutting off payment of their fees. In addition, appointed counsel could be limited in their ability to mount the defenses that their clients otherwise would have presented in consequence of the need to justify expenditures to both this Court and the Court of Appeals and the risk that sufficient funds would not be available even to pay the well below market maximum hourly rates permitted under the CJA.[FN157]

FN157. CJA counsel in non-capital cases may be paid no more than $94 per hour. *See* Press Release, United States District Court, Southern District of New York (May 21, 2007), *available at* http:// www 1. nysd. uscourts. gov/ pr 07-0521- cja. php.

This is not to say that attorneys appointed under the CJA inevitably could not provide the minimally effective defense that the Constitution requires. That is unclear, one way or the other. But it is to say that defendants would be wiped out financially as a result of the government's actions before they became eligible for CJA representation and that the representation they would receive in that event would be constrained in ways that would not have obtained absent the government's interference. While CJA relief would be better than nothing, it would not be the substantial equivalent of what these defendants lost as a result of the government's constitutional violations.

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Accordingly, the Court turns to the impact of the government's violations on the individual defendants.

B. Defendants Deprived of Counsel of Choice

Messrs. Gremminger, Hasting and Watson have been deprived by the government's actions of the counsel they chose. As a result of those actions, they simply lack the resources to engage the lawyers of their choice,[FN158] lawyers who had represented them as long as KPMG was paying the bills.

FN158. Gremminger Decl. [dkt. item 1110] ¶¶ 2, 5, 7; Hasting Am. Decl. [dkt. item 1046] at 1-2; *United States v. Stein,* 488 F.Supp.2d 370, 371-72; Watson Decl. [dkt. item 1009] ¶¶ 15-17.

[6][7] Mr. Ritchie was deprived by the government's actions of the services of CWT, which was to have played an integral role in his defense. [FN159] The fact that ***422** he still is represented by the Arguedas firm does not render immaterial the loss of CWT. As *Stein I* held, and as the Supreme Court and the Second Circuit have recognized, a criminal defendant has a constitutional right "to control the presentation of his defense." [FN160] " Inherent in a defendant's right to control the presentation of his defense is the right to choose the counsel who presents it." [FN161] This includes the right to a second lawyer or law firm if the defendant can afford it, either from his own resources or from resources lawfully available to him from others. [FN162]

FN159. Half of Mr. Ritchie's defense costs are being advanced by another employer. Nevertheless, he is unable to fund even half of the cost of the defense that he would have mounted had KPMG paid his expenses. Ritchie 2d Supp. Decl. [dkt. item 1113] ¶¶ 9, 16.

FN160. *Lainfiesta v. Artuz,* 253 F.3d 151, 154 (2d Cir.2001) (citing *Herring v. New York,* 422 U.S. 853, 857, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)), *cert. denied, Lainfiesta v. Greiner,* 535 U.S. 1019, 122 S.Ct. 1611, 152 L.Ed.2d 625 (2002).

FN161. *Id.* (citing *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) (acknowledging "defendant's right ' to select and be represented by one's preferred attorney' ") (quoting *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)); *Faretta v. California,* 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (holding defendant has right to represent himself at trial)).

FN162. *See, e.g., Lainfiesta,* 253 F.3d at 154-56; *Stein I,* 435 F.Supp.2d at 367.

[8] As the Supreme Court held only last year in *United States v. Gonzalez-Lopez,*[FN163] the unjustified denial of the right to counsel of one's choice violates the Sixth Amendment without regard to considerations of prejudice:

FN163. --- U.S. ----, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

"Where the right to be assisted by counsel of one's choice is wrongly denied, ... it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice-which is the right to a particular lawyer regardless of comparative effectiveness-with the right to effective counsel-which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." [FN164]

FN164. *Id.* at 2563.

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[9] To be sure, *Gonzalez-Lopez* was a case in which a new trial, with the defendant represented by his chosen attorney, was entirely feasible, so the matter was remanded. Here, however, there are no funds to pay for these defendants' counsel of choice. Accordingly, the indictment must be dismissed as to these defendants because they have been deprived of counsel of their choice, independent of the existence of other grounds.[FN165]

> FN165. The Court notes that *Lainfiesta* rejected the contention that the temporary denial of a second attorney of choice, specifically the trial court's refusal to permit one of the defendant's two attorneys to conduct a cross-examination of a forensic expert witness, was a structural error and applied harmless error analysis. This does not suggest a similar approach to this case.
> The *Lainfiesta* panel applied harmless error analysis rather than presuming prejudice under the structural error doctrine because (1) "the error affected only the cross-examination of a single witness," (2) defendant's chosen lead counsel conducted the cross-examination with the second attorney sitting at counsel table, and (3) the second attorney was not totally unavailable to defendant because he "was accessible to [lead counsel] for consultation at all times and was never prevented from sharing his 'broader knowledge' of forensic science with him." 253 F.3d at 157-58. *Lainfiesta's* holding on this point therefore has no bearing on this case, where Mr. Ritchie has been deprived entirely of the services of CWT and the consequences of that deprivation cannot be known.

*423 *C. The KPMG Defendants as to Whom the Government Concedes Dismissal*

The government, given *Stein I,* concedes that the indictment should be dismissed also against nine other defendants: Messrs. Bickham, DeLap, Eischeid, Smith, Rosenthal, Lanning, Stein, Warley, and Wiesner. Its "given *Stein I* " hedge, however, suggests that it may renew on appeal its contention that the KPMG Defendants were obliged to demonstrate prejudice. It is unnecessary to address this point further in light of the discussion in *Stein I.* Nevertheless, the Court's finding, based on this expanded record, that all of these defendants, as well as Messrs. Gremminger, Hasting, Ritchie and Watson, have been forced by KPMG's cutoff of payment of defense costs to curtail the defenses they would have mounted had KPMG paid those costs would satisfy any requirement of prejudice.

One additional point merits brief mention. At oral argument, the Court raised, as a conceptual matter, the fact that persons facing criminal prosecution may limit the amount they spend for at least two reasons. Some lack the funds to pay for the defenses they desire. Others have the funds, but choose to spend them on other things. Hence, it perhaps would be arguable that a defendant of the second type-one who has sufficient funds to defend-should not obtain a dismissal even if the government wrongfully has prevented a third party from paying the defendant's defense costs. The injury in that case perhaps could be said to be monetary alone rather than one that would affect the ability to mount a defense of choice. But this inquiry ultimately has proved in this case to be of only academic interest.

The Court, in ruling on another motion, has found that Mr. Hasting is insolvent.[FN166] Mr. Watson has assets of approximately $80,000, owes his lawyers approximately $1 million, and has no regular source of income.[FN167] Mr. Bickham has remaining assets of less than $300,000, owes his lawyers over $600,000, and is threatened by his attorneys with a motion for leave to withdraw. Although he apparently has been able to earn significant income as a self-employed accountant, his ability to earn would be seriously compromised by the need to participate in a lengthy trial.[FN168] None of them can afford to defend this case at any meaningful level.

FN166. 488 F.Supp.2d at 371-72.

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FN167. Watson Decl. [dkt. item 1009] ¶ ¶ 16-17, 19.

FN168. Bickham Decl. [dkt. item 1003] ¶ ¶ 7, 9-11.

The other ten defendants as to whom the government concedes dismissal are in better financial circumstances. Their net assets range from something less than $1 million to something more than $5 million, with most being in the $1 to $3 million range.[FN169] There is no denying the fact that this is a great deal of money to most people. But there also is no denying that it is not sufficient for any of them to defend this case as they would have defended it absent the government's actions.

FN169. DeLap Decl. [dkt. item 1118] ¶ 5; Eischeid Decl. [dkt. item 1117], Att.; Gremminger Decl. [dkt. item 1110] ¶ 2; Lanning Decl. [dkt. item 1119] ¶ 7 & Sch. A; Ritchie 2d Supp. Decl. [dkt. item 1113] ¶ 16; Rosenthal Aff. [dkt. item 1116] ¶ 4; Smith Decl. [dkt. item 1108] ¶¶ 5-8; Stein Am. Decl. [dkt. item 1121] ¶ 3; Warley Aff. [dkt. item 1114] ¶¶ 9-18; Weisner Decl. [dkt. item 1109] ¶¶ 7-8.

As an initial matter, some of the defendants' submissions disclose the fees and expenses, paid and unpaid, that they have incurred to date in defending this case. They range from a low of around $500,000 to a high of $3.6 million. They average roughly $1,700,000 per defendant so far.[FN170] ***424** And the most expensive part of the case-a six to eight month trial-lies ahead.

FN170. Bickham Decl. [dkt. item 1003] ¶ 7; Arkin Decl. (Eischeid) [dkt. item 1117] ¶ 7 (discloses only fees already paid without stating fees incurred since Sept. 2006); Gremminger Decl. [dkt. item 1110] ¶ 7; Hasting Am. Decl. [1046] at 2; Lanning Decl. [dkt. item 1119] ¶ 2; Rosenthal Aff. [dkt. item 1116] ¶ 6; Smith Decl. [dkt. item 1108] ¶ 4; Stein Am. Decl. [dkt. item 1121] ¶ 2; Warley Aff. [dkt. item 1114] ¶ 6; Watson Decl. [dkt. item 1009] ¶ 15; Wiesner Decl. [dkt. item 1109] ¶ 7.

More broadly, experienced counsel have submitted estimates of the cost of defending this case, assuming that KPMG or a comparable company were paying the defense costs. These have been based both on the actual costs of prior complex white collar criminal cases in which they have been involved, albeit none so large and complex as this, and on published reports of the defense costs in other such cases. These estimates are instructive.

First, prior to oral argument, one of the defendants' attorneys submitted a declaration stating the actual cost of his defense of a much smaller white collar criminal case involving a much shorter trial and far fewer documents than this one was $3.3 million.[FN171] The government agreed that $3.3 million would be "a very conservative estimate" of what it would cost to defend this case.[FN172] The same defense attorney later estimated that the cost of defending his client in this case as he would have defended him were KPMG paying the bills would have been more than $10 million.[FN173] Other defense attorneys put that figure in the range of $7 to $24 million each, with the average figure being around $13 million.[FN174]

FN171. Spears Decl. [dkt. item 1071] ¶¶ 3-10.

FN172. Tr., July 2, 2007, at 58:5-13.

FN173. Spears Decl. [dkt. item 1100] ¶¶ 7-8.

FN174. *See* Arkin Decl. [dkt. item 1117] ¶ 12; Gioiella Decl. [dkt. item 1095], at 1; Bauer Decl. [dkt. item 1094] ¶ 27; Necheles Decl. [dkt. item 1102] ¶ 16; Rule Decl. [dkt. item 1104] ¶ 9.

Second, both defendants and the government have pointed to press reports concerning defense costs in

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a number of recent high profile white collar prosecutions, all of which involved far fewer documents and far fewer defendants and most of which involved far shorter trials than this case will require. These have included costs of $14.9 million (Kumar-Computer Associates), $17.7 million and $8 million for each of two trials (Kozlowski-Tyco), $24 million (Shelton-Cendant), $25 million (Rigases-Adelphia), $32 million (Scrushy-HealthSouth), and $25 and $70 million (Lay and Skilling, respectively-Enron).[FN175]

FN175. Strassberg Decl. [dkt. item 1105] ¶ 15.

The government was given the opportunity to comment both on defendants' estimates and on the published reports. Apart from its agreement that $3.3 million would be a "very conservative estimate " of the cost of defending this case, it has not done so. It declined also to provide its own estimate. [FN176] Thus, the government has elected not to contest any of the information before the Court.

FN176. Letter, John M. Hillebrecht, July 9, 2007 [dkt. item 1127]; Tr. July 2, 2007, at 58:20-59:10; Order, July 3, 2007 [dkt. item 1079].
The government's protestation of inability to do so is unconvincing. The USAO and the Department of Justice prepare budgets every year. They frequently are involved in litigation concerning attorneys' fee applications. The criminal defense bars in this and other cities are filled with former AUSAs who have intimate knowledge of the costs of defending large, document intensive criminal cases that they doubtless would have been happy to share with the government. The government, however, was within its rights in declining as a matter of policy to offer an estimate, although it of course must live with the consequences of that decision.

*425 The Court of course understands that the estimates of defendants' counsel are subject to bias, that published reports may be inaccurate, and that any estimate inherently is uncertain. But district judges pass on fee applications all the time. They of necessity are knowledgeable about the cost of litigation.[FN177] Without adopting any specific figure, the Court, based on its intimate familiarity with this case, the costs actually incurred to date, the scope of the task that lies ahead, and its awareness of the market for legal services, finds that none of the thirteen KPMG Defendants as to whom the government concedes dismissal has the resources to defend this case as he or she would have defended it had KPMG been paying the cost, even if he or she liquidated all property owned by the defendant.[FN178]

FN177. For example, under fee-shifting statutes "[i]t remains for the district court to determine what fee is 'reasonable.' " *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). This determination entails excluding " hours that were not 'reasonably expended' " and may involve considering "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Id.* at 430 n. 3, 434, 103 S.Ct. 1933.

FN178. All of the figures, including that which the government agrees would be "a very conservative estimate" of the cost of defending this case, are astonishingly large, not in the sense that they are not credible, but for what they say about the cost of justice in our society and about the

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> disparity between those with means and those without. Both are subjects that warrant careful attention by anyone concerned with the overall fairness, accessability and legitimacy of our judicial system. In deciding a given case, however, any court must deal with the reality that exists.

This is not to say that the Constitution guarantees anyone charged with a crime representation by a " Dream Team" or a multimillion dollar defense. But, as *Stein I* held, it does guarantee those who can afford it the right to spend their money for the best (or, what is not always the same thing, the most expensive) defense that money can buy, free of unjustified interference by the government. It also, as a general matter, prevents the government from interfering if a criminal defendant is fortunate enough to have someone who is willing to give the defendant the money to pay for a defense, even a very expensive one. The vice of the government's actions here was that the government improperly interfered with the payment of defense costs that KPMG otherwise would have paid, just as KPMG paid for a $20 million defense for four of its personnel in the Xerox case.

D. The Defendants as to Whom the Government Resists Dismissal

Notwithstanding its concession that dismissal is the only appropriate remedy for most of the KPMG Defendants, the government resists dismissal as to Messrs. Larson, Pfaff and Greenberg.

1. Defendants Pfaff and Larson

The government argues that Messrs. Pfaff and Larson, who left KPMG some time ago, did not ask KPMG to pay their defense costs until May 2006. This, the government maintains, shows that these defendants were not affected by the government's actions.[FN179] While the fact that the demand came late in the day is not ***426** persuasive, the government's argument draws attention to significant facts.

> FN179. *See* Tr., July 2, 2007, at 52:5-54:19.

Messrs. Pfaff and Larson left KPMG in 1997 and formed a limited liability company,[FN180] Presidio, that played a central role in transactions at issue here. While the government acknowledges that the indictment embraces some conduct in which Pfaff and Larson allegedly engaged while still at KPMG, it asserts that a majority took place after they had left the firm.[FN181] Pfaff and Larson do not dispute this although they point out that the allegations of their post-KPMG employment activities relate back to a conspiracy allegedly formed earlier and that they are responsible in law for the acts of co-conspirators still employed by KPMG after Pfaff and Larson left. [FN182]

> FN180. Superseding indictment [dkt. item 57] ¶ 13.
>
> FN181. Govt. Mem. [dkt. item 1051] 39.
>
> FN182. Pfaff-Larson Reply Mem. [dkt. item 1061] 6-7.

[10] While an insurer has a duty to defend an insured against the entirety of an action in which the complaint asserts any claim that potentially is covered by the policy,[FN183] it has not been determined whether KPMG had a contractual or other legal obligation to defend. It is even less clear that it would have paid Pfaff's and Larson's defense costs, as a matter either of grace or of obligation, given that Pfaff and Larson left the firm so long ago and that a majority of their alleged conduct occurred after they left the firm. In consequence, Messrs. Pfaff and Larson have failed to establish a likelihood that the government's actions interfered with their ability to defend themselves.

> FN183. *Buss v. Superior Court,* 16 Cal.4th 35, 47-48, 65 Cal.Rptr.2d 366, 939 P.2d 766, 774-75 (1997). (Pfaff and Larson worked in KPMG's San Francisco office).

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2. Defendant Greenberg

Mr. Greenberg is differently situated from all of the other KPMG Defendants. He parted with the firm two years before the indictment in strained circumstances, entered into a settlement agreement pursuant to which he received a substantial payment, and gave KPMG a release.[FN184]

FN184. Pitofsky Decl. [dkt. item 763] Ex. B, ¶¶ 2, 8.

[11] Greenberg released KPMG "from any and all causes of action, ...*contracts*,... claims, liabilities, ... and demands, known or unknown, suspected to exist or not suspected to exist, anticipated or not anticipated, ... which Greenberg ha[d] or may have against [it] ... by reason of any and all acts, omissions, events or facts occurring or existing prior to the date hereof as it relates to Greenberg's membership in KPMG and his resignation from that partnership...." [FN185] This clearly and unambiguously released any claim by Greenberg that KPMG was obligated to indemnify him or advance his defense costs pursuant to any contract, express or implied, that arose in connection with his employment.[FN186]

FN185. *Id.* at ¶ 8 (emphasis added).

FN186. This issue was fully briefed and ripe for decision on a motion by KPMG in the ancillary proceeding for partial summary judgment dismissing, among other things, Mr. Greenberg's contract claim for advancement of defense costs. The decision granting that aspect of the motion was on the verge of being filed when the Second Circuit stayed that proceeding.

To be sure, the release did not foreclose the possibility that Mr. Greenberg, absent the government's interference, would have sought payment from KPMG, either as a *427 matter of grace or pursuant to California statutes.[FN187] Given the circumstances of his departure,[FN188] however, the Court is not persuaded that KPMG would have paid his defense costs even in the absence of government interference.[FN189]

FN187. CAL. LAB.CODE § 2802(a) (requirement of indemnification); CAL. CIV.CODE § 2778 (indemnification includes defense costs); *Jacobus v. Krambo Corp.*, 78 Cal.App.4th 1096, 93 Cal.Rptr.2d 425 (Cal.Ct.App.2000) (LAB.CODE§ 2802 requires employer to defend or pay defense costs); *Alberts v. Am. Cas. Co.*, 88 Cal.App.2d 891, 899, 200 P.2d 37, 42-43 (Cal.Ct.App.1948) (indemnitee may be entitled to recover as soon as it becomes liable). Under CAL. LAB.CODE § 2804, the release Greenberg signed was not effective to release his statutory rights.

FN188. KPMG distrusted Mr. Greenberg. *See* Pitofsky Decl. [dkt. item 763] Ex. G; Greenberg Rule 56.1 St. [dkt. item 763-10] ¶ 11. The settlement agreement, moreover, evidences a desire on the part of KPMG to be done with Mr. Greenberg, once and for all.

FN189. It is unnecessary to determine whether this conclusion means that the constitutional rights of Messrs. Greenberg, Pfaff and Larson were not violated or only that dismissal is not an appropriate remedy.

VI. Conclusion

For the reasons set forth above and in previous opinions, the motions of defendants Bickham, DeLap, Eischeid, Gremminger, Hasting, Lanning, Ritchie, Rosenthal, Smith, Stein, Warley, Watson, and Wiesner to dismiss the indictment are granted. The motions of defendants Greenberg, Pfaff and Larson are denied.

The Court has reached this conclusion only after pursuing every alternative short of dismissal and only with the greatest reluctance. This indictment

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charges serious crimes. They should have been decided on the merits as to every defendant. The Court well understands, moreover, that prosecutors can and should be aggressive in the pursuit of the public interest. It respects the distinguished record of the United States Attorney's Office for the Southern District of New York, which long has been, and continues to be, a model for the nation. FN190 But there are limits on the permissible actions of even the best prosecutors. As the Supreme Court wrote long ago, a prosecutor

> FN190. *See generally* Lewis A. Kaplan, *Henry L. Stimson Award Ceremony: Remarks,* 54 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 421 (1999).

"is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." FN191

> FN191. *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The Department of Justice, in promulgating the aspects of the Thompson Memorandum here at issue, and the USAO in the respects discussed above and in *Stein I,* deliberately or callously prevented many of these defendants from obtaining funds for their defense that they lawfully would have had absent the government's interference. They thereby foreclosed these defendants from presenting the defenses they wished to present and, in some cases, even deprived them of counsel of their choice. This is intolerable in a society that *428 holds itself out to the world as a paragon of justice. The responsibility for the dismissal of this indictment as to thirteen defendants lies with the government.

The foregoing supplements the findings of fact and conclusions of law previously made in this matter.

SO ORDERED.

S.D.N.Y.,2007.
U.S. v. Stein
495 F.Supp.2d 390, 2007-2 USTC P 50,549

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The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

The Department experienced unprecedented success in prosecuting corporate fraud during the last four years. We have aggressively rooted out corruption in financial markets and corporate board rooms across the country. Federal prosecutors should be justifiably proud that the information used by our nation's financial markets is more reliable, our retirement plans are more secure, and the investing public is better protected as a result of our efforts. The most significant result of this enforcement initiative is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement. Through their self-regulation efforts, fraud undoubtedly is being prevented, sparing shareholders from the financial harm accompanying corporate corruption. The Department must continue to encourage these efforts.

Though much has been accomplished, the work of protecting the integrity of the marketplace continues. As we press forward in our enforcement duties, it is appropriate that we consider carefully proposals which could make our efforts more effective. I remain convinced that the fundamental principles that have guided our enforcement practices are sound. In particular, our corporate charging principles are not only familiar, but they are welcomed by most corporations in our country because good corporate leadership shares many of our goals. Like federal prosecutors, corporate leaders must take action to protect shareholders, preserve corporate value, and promote honesty and fair dealing with the investing public.

We have heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation. Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result.

Therefore, I have decided to adjust certain aspects of our policy in ways that will further promote public confidence in the Department, encourage corporate fraud prevention efforts, and clarify our goals without sacrificing our ability to prosecute these important cases effectively. The new language expands upon the Department's long-standing policies concerning how we evaluate the authenticity of a corporation's cooperation with a government investigation.

This memorandum supersedes and replaces guidance contained in the Memorandum from Deputy Attorney General Larry D. Thompson entitled Principles of Federal Prosecution of Business Organizations (January 20, 2003) (the "Thompson Memorandum") and the Memorandum from the Acting Deputy Attorney General Robert D. McCallum, Jr. entitled Waiver of Corporate Attorney-Client and Work Product Protections (October 21, 2005)(the "McCallum Memorandum").

The Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Paul J. McNulty
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Federal Prosecution of Business Organizations[1]

I. Duties of the Federal Prosecutor; Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating wrongdoing and bringing charges for criminal conduct, the Department plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate. In this respect, federal prosecutors and corporate leaders share a common goal. Directors and officers owe a fiduciary duty to a corporation's shareholders, the corporation's true owners, and they owe duties of honest dealing to the investing public in connection with the corporation's regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in

[1] While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

which we do our job as prosecutors – the professionalism we demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation – impacts public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action.

II. Charging a Corporation: General Principles

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (I) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons -- both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated--at least in part--by an intent to benefit the corporation). In *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "*Partucci* was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Furthermore, in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 969-70 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999), the D.C. Circuit rejected a corporation's argument that it should not be held criminally liable for the actions of its vice-president since the vice-president's "scheme was designed to -- and did in fact -- defraud [the corporation], not benefit it." According to the court, the fact that the vice-president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president's job was to cultivate the corporation's relationship with the congressional candidate's brother, the Secretary of Agriculture. Therefore, the court held, the jury was entitled to conclude that the vice-president had acted with an intent, "however befuddled," to further the interests of his employer. *See also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which <u>may</u> be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; *quoting Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), *cert. denied*, 326 U.S. 734 (1945)).

III. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* USAM § 9-27.220, *et seq*. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see section IV, *infra*);

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section V, *infra)*;

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (see section VI, *infra*);

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, *infra*);

5. the existence and adequacy of the corporation's pre-existing compliance program (see section VIII, *infra*);

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see section IX, *infra*);

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (see section X, *infra*);

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions (see section XI, *infra)*.

B. Comment: In determining whether to charge a corporation, the foregoing factors must be considered. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities -- are adequately met, taking into account the special nature of the corporate "person."

IV. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. *See* USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, *e.g.*,voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the

heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

V. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, *e.g.*, salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. *See* USSG §8C2.5, comment. (n. 4).

VI. Charging a Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a

corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, *e.g.*, subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. *See* USSG § 8C2.5(c) & comment.(n. 6).

VII. Charging a Corporation: The Value of Cooperation

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. Relevant considerations in determining whether a corporation has cooperated are set forth below.

1. Qualifying for Immunity, Amnesty or Pretrial Diversion

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. *See* USAM § 9-27.600-650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. *See* USAM §9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

2. Waiving Attorney-Client and Work Product Protections[2]

The attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). As the Supreme Court has stated "its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* The work product doctrine also serves similarly important interests.

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely

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[2] The Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* USSG §8C2.5(g). The reference to consideration of a corporation's waiver of attorney-client and work product protections in reducing a corporation's culpability score in Application Note 12, was deleted effective November 1, 2006. *See* USSG §8C2.5(g), comment. (n.12).

desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation.

Whether there is a legitimate need depends upon:

(1) the likelihood and degree to which the privileged information will benefit the government's investigation;

(2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;

(3) the completeness of the voluntary disclosure already provided; and

(4) the collateral consequences to a corporation of a waiver.

If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I"). Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.

Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor's request to the United States Attorney for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category I information must be maintained in the files of the United States Attorney. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

A corporation's response to the government's request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government's investigation.

Only if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product ("Category II"). This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.

This category of privileged information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel's mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.

Prosecutors are cautioned that Category II information should only be sought in rare circumstances.

Before requesting that a corporation waive the attorney-client or work product protections for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney's request for authorization to seek a waiver must set forth law enforcement's legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category II information must be maintained in the files of the Deputy Attorney General. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision. Prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation.

Requests for Category II information requiring the approval of the Deputy Attorney General do not include:

(1) legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and

(2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

In these two instances, prosecutors should follow the authorization process established for requesting waiver for Category I information.

For federal prosecutors in litigating Divisions within Main Justice, waiver requests for Category I information must be submitted for approval to the Assistant Attorney General of the Division and waiver requests for Category II information must be submitted by the Assistant Attorney General for approval to the Deputy Attorney General. If the request is authorized, the Assistant Attorney General must communicate the request in writing to the corporation.

Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government. However, voluntary waivers must be reported to the United States Attorney or the Assistant Attorney General in the Division where the case originated. A record of these reports must be maintained in the files of that office.

3. Shielding Culpable Employees and Agents

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys' fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate.[3] This prohibition is not meant to prevent a prosecutor from asking questions about an

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[3] In extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny. *See discussion in* Brief of Appellant-United States, *United States v. Smith and Watson*, No. 06-3999-cr (2d Cir. Nov. 6, 2006). Where these circumstances exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions. Prosecutors should follow the authorization process established for waiver requests of Category II information (see section VII-2, *infra*).

attorney's representation of a corporation or its employees.[4]

4. Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct intended to impede the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

5. Offering Cooperation: No Entitlement to Immunity

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VIII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is

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[4] Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, frequently arise in the course of an investigation. They may be necessary to assess other issues, such as conflict-of-interest. Such questions are appropriate and this guidance is not intended to prohibit such inquiry.

not adequately enforcing its program. In addition, the nature of some crimes, *e.g.*, antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. *See United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if... such acts were against corporate policy or express instructions."). In *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. According to the court, a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts; "even a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." Similarly, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.[5] It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient; "Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." *See also United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but ... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held

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[5] Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus, bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1006 & n4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated "that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws."

legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.[6] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonably designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. *In re: Caremark*, 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents.

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[6] For a detailed review of these and other factors concerning corporate compliance programs, *see* USSG §8B2.1.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

IX. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

X. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (*e.g.*, publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

XI. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, *e.g.*, civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;

2. the likelihood that an effective sanction will be imposed; and

3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. *See* USAM §§ 9-27.240, 9-27.250.

XII. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime." *See* USAM § 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993.

XIII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. *See* USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ... is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." *See* Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." *See* USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. *See* USSG §§ 8B1.1, 8C2.1, *et seq*. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VIII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VII, *supra*.

This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

LEGAL HUMOR and TOTALLY USELESS FACTS

Lawyer: "Now that you have been acquitted, will you tell me truly? Did you steal the car?"
Client: "After hearing your amazing argument in court this morning, I'm beginning to think I didn't.

Attorney: Do you believe you are emotionally stable?
Witness: I used to be.

Attorney: Were you alone or by yourself?

Attorney: How many times have you committed suicide?

By Attorney (having thought of an ill conceived question that he evidently decided not to ask): "Your Honor -- I'd like to strike the next question."

By Attorney: Any suggestions as to what prevented this from being a murder trial instead of an attempted murder trial?

By Witness: The victim lived.

A guy was filling out a job application when he came to the question: "Have you ever been arrested?" "No", he answered.

The next question, intended for those who answered the preceding question with a yes, was "Why?" Nevertheless, the guy answered it "Never got caught."

The only seven letter word in the English language that contains ten words without rearranging any of its letters is "therein" -- the, there, he, in, rein, her, here, ere, therein, and herein.

The word "sheriff" is derived from "shire reeve." In early England, each shire had a reeve who was the law for that shire. When the term was brought to the United States it was shortened to sheriff.

In England, the Speaker of the House is not allowed to speak.

The last NASCAR driver to serve jail time for running moonshine was Buddy Arrington.

The fingerprints of a koala bear are virtually identical to the patterns of a human's, so much so that they could be confused with each other at a crime scene.

Lizzie Borden was actually acquitted of killing her father and step-mother with an axe.

The Declaration of Independence was written on hemp paper.

CRIMINAL CODE REORGANIZATION STUDY COMMITTEE

MEMBERSHIP

Legislative Members	***Public Members***
Senator Keith A. Kreiman, Co-chair	***Dave Erickson***
Senator Robert M. Hogg	***Jennifer Miller***
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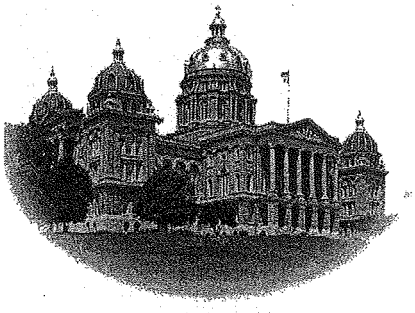
Representative Clel Baudler	***Bob Rigg***
Representative Rick Olson	***Elizabeth Robinson***
	Jean Schlichtemeier
	Pamela Summers
	James Tomkovicz

Agenda

Tuesday, October 30, 2007
Supreme Court Consultation, Room 102, State Capitol

10:00 a.m.	Convene Meeting--Roll Call Adopt Minutes
10:10 a.m.	Criminal Code, Sentencing, and Corrections, Fred Scaletta, Public and Media Relations Director, Department of Corrections
11:30 a.m.	Leslie Hickey, Iowa Code Editor, Legislative Services Agency
Noon	Lunch
1:00 p.m.	Drug Court Panel Discussion • Honorable Fae Hoover-Grinde, District Judge, 6th Judicial District • Honorable Glenn Pille, District Judge, 5th Judicial District • Honorable Richard Meadows, District Judge, 8th Judicial District.
2:00 p.m.	Iowa State Bar Association Presentation
2:20 p.m.	Iowa Trial Lawyers Association Presentation
2:40 p.m.	Committee Discussion • Set Next Meeting Date • Old Business • New Business • Next Steps
4:00 p.m.	Adjournment



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To: Members of the Criminal Code Reorganization Study Committee

From: Joe McEniry and Rachele Hjelmaas, Legal Services, Legislative Services Agency

Date: October 23, 2007

RE: 2nd Meeting

Enclosed please find copies of the tentative agenda and the minutes from our last meeting.

Our meeting will take place at 10:00 a.m. in the Supreme Court Consultation Room, Room 103, at the Capitol.

As you know parking is difficult at the Capitol, I recommend parking south of the Capitol near the monuments and proceeding through the south entrance of the Capitol. If the south parking lots are full, there are also public spots available east of the Capitol and north of the Lucas Building.

The agenda and written materials may also be accessed through the committee's website: http://www.legis.state.ia.us/scripts/docmgr/docmgr_comdocs.dll/showtypeinterim?idt=true&type=ih&com=211

TO: CRIMINAL CODE REORGANIZATION STUDY COMMITTEE

FROM: ICAA

PRIMARY RECOMMENDATION:

In order to understand the enormity of the task of revising the Criminal Code, resolve instead to undertake and complete a revision of only one criminal code chapter before moving to another chapter. Concentrating on one topic will be difficult enough, but would yield better results than taking a "shotgun" approach to the entire criminal code. Suggestions for the first task would be: chapter 321, traffic code; chapter 321J, OWI; or chapter 124, controlled substances.

SPECIFIC CRIMINAL RECOMMENDATIONS:

1. Repeal section 692A.2A, sex offender residency restrictions, enact "safe zones" and preempt local ordinances.

2. Redefine "reckless" in 702.16.

3. Define criminal actual and constructive possession.

4. Revise the sentencing schedule so that all crimes assigned to a specific "class" have consistent provisions. Remove the present inconsistencies.

5. Statutorily determine the lesser included offenses for each crime.

6. Make the majority of traffic violations, as well as DNR violations, civil infractions and reserve criminal sanctions for only the most severe of such offenses.

7. Remove crimes from "regulatory" chapters and convert to civil infractions.

8. Repeal the cowl lamp statute.

9. Amend 701.11 to require admission at trial of defendant's prior acts of sexual abuse.

10. Amend 692A.2 to give juvenile courts discretion regarding sex offender registry and duration of registration.

11. Amend 907.1 to define "expunged" in regard to deferred judgment records and 907.9 to clarify that access to such records is available to all persons set forth in 907.4.

12. Lengthen the speedy trial rule to 180 days for persons not incarcerated.

13. Conform Iowa law to federal law regarding possession of firearms by persons convicted of domestic abuse or who have been committed for a mental illness.

14. Amend 709.1 to make it a crime to perpetrate a sex act by deception.

15. Amend 728.12 to make it illegal to sexually exploit a person "reasonably believed to be a minor."

16. Create the crime of "Forced Sex Act" for an adult to use a position of authority to cause children to engage in a sex act.

17. Target the use of electronic monitoring of sex offenders on parole or work release under new sections 906.4 and 907.6 and by repeal of 692A.4A.

18. Amend 707.2, murder in the first degree, to provide that willful injury which results in death is a class A felony.

19. For juvenile alcohol enforcement under 123.47, allow use of Preliminary Breath Testing devices, create a civil penalty for refusal, and allow admission at trial of PBT results and refusals to test.

20. Amend 147.111, report of treatment of wounds, to include the crimes of homicide or serious injury by motor vehicle as defined in section 707.6A.

21. Amend 123.46, public intoxication, to include intoxication by controlled substances and inhalants.

22. Eliminate the suspension of sentence for an habitual offender under 907.3.

23. Eliminate the simple misdemeanor in 804.20 regarding provision of a phone call to drunk drivers.

24. Revise 155A.24, pharmacy prohibited acts penalties, to clarify the penalties.

25. Eliminate automatic dismissal of juvenile delinquency petition upon commitment for mental illness or retardation under 232.51.

26. Amend 232.116 and 232.102 to allow termination of parental rights when TPR has been ordered for another child in the same family or when such an order has been entered in a court of another state.

27. Make it illegal for an owner or lessee of property to knowingly permit alcohol to be consumed or possessed on their premises by any person under legal age.

28. Prohibit charitable contributions pursuant to 907.13.

29. Make the assessment and amount of a civil penalty for a deferred judgment under 907.14 discretionary.

30. Enact an electronic tracking system for sales of pseudoephedrine.

31. Amend 809.5, disposition of seized property, to remove the requirement of certified mail for property valued under $500.

32. Amend 728.12 to make each computer image of child pornography a criminal offense.

33. Allow state appeals in sexually violent predator cases.

34. Amend 123.46(5), public intox/consumption, to change the term "exonerated" to "expunged" and to prohibit expunging a prior conviction after two years if the person is currently charged under 123.46.

35. Require parental notification for juveniles who are passengers in vehicles driven by persons under legal age in violation of 321J.2 or 321J.2A.

36. Repeal all suspensions of driver's licenses for actions not directly related to traffic safety.

37. Amend 232.8 to exclude from Juvenile Court jurisdiction all vehicular homicide cases involving offenders 16 or 17 years of age.

38. Amend 714.2(2) to provide that theft of a firearm, regardless of value, is second degree theft, a class D felony.

39. Include BB guns, whether CO2 or spring loaded, in the list of dangerous weapons.

40. Amend 708.2, assault, to provide an enhanced penalty of an aggravated misdemeanor for commission of simple or serious misdemeanor assault by a person previously convicted of two or more assaults.

41. Amend 709.9 to increase the penalty from serious to aggravated misdemeanor if the victim of indecent exposure is a child.

42. Enhancement charges should have consistent language: Change chapter 714, theft, section 124.401, possession, and section 123.91, public intox, to contain: "Each previous violation on which conviction was entered prior to the date of the offense charged shall be considered and counted as a separate previous offense."

43. Amend 692A.1(5)(n) by striking "subsection 1", in order to clarify that person convicted of enticing away a minor in violation of section 710.10(2) or (3) is required to register as a sex offender.

44. Amend 811.2, conditions of release, to give specific authority for the court to order a defendant to submit to and complete a substance abuse evaluation and complete such treatment as recommended by the evaluation.

45. Amend Rule of Criminal Procedure 10 to require the defense in all indictable cases to file a list and minutes of testimony for all defense witnesses, excluding the defendant.

46. Amend the Post Conviction Procedure Act to permit the attorney appointed to move that the petition be dismissed as frivolous as is permitted by Rule 6.104 of the Rules of Appellate Procedure.

47. Provide authority for assessing the costs of extradition to a person convicted, in the manner of court costs upon certification.

48. Allow enhancement of possession of controlled substance charge under 124.401(5) for prior offenses. Repeal 124.411(3).

49. Amend 124.411(2) to allow the use of deferred judgments as a prior offense.

50. Make the definition of serious injury in 321J.1(a) uniform with the definition in 702.18.

51. Remove the undefined term "personal injury reasonably likely to cause death" in sections 321J.10 and .10A and insert the term "serious injury."

52. Amend 321J.8 to provide (1) that a person whose drivers license is suspended, revoked or barred may not refuse to submit to a chemical test and, (2) a licensed driver who refuses a chemical test is guilty of a serious misdemeanor.

53. Amend 321J.8 to allow cross examination of a defendant regarding a prior OWI conviction on the issue of refusal to submit to chemical testing in the present case.

54. Amend 321J.21 to remove references to "suspended, denied, or barred" which are terms inconsistent with Chapter 321J.

55. Amend 809.1 to allow seizure of evidence in Chapter 321 violations, except in scheduled violations.

56. Consolidate within one chapter all violations for driving while suspended, revoked, barred or without a license.

57. Amend 321.279(2) and (3) to include reckless driving as a predicate in order to increase the penalty in eluding cases.

58. Amend 321.277, reckless driving, to allow jury consideration of the status of a person's drivers license or operating privilege in determining "willful disregard of the consequences."

Thursday, November 29th

7:30-8:00 a.m. Registration & Breakfast

8:00-9:00 a.m. John Burns, Assistant Federal Public Defender, Iowa Case Law Update

9:00-10:00 a.m. Jim Wetterling, Attorney Practicing Law in the Digital Age Case file mgt for the small firm practitioner

10:00-10:15 a.m. BREAK

10:15-11:15 a.m. Nick Drees, Federal Public Defender, Recent Development in Federal Law

11:15-12:15 p.m. Angela Campbell, Attorney Immigration Law

12:15-1:15 LUNCH

1:15-2:15 p.m. Ethics Panel I, Panel TBA

2:15-2:30 p.m. BREAK

2:30-4:30 p.m. Bobby Rehkemper & Matt Lindholm, Attorneys OWI & DOT Update

4:30-5:30 p.m. Tammy Gentry, Practicing Law in the Digital Age—Digital Imagery

There will be a cocktail reception immediately following at Winston's on the skywalk level of Ruan II.
The reception is sponsored by:

Sweeney Court Reporting

Friday, November 30th

8:00-9:00 a.m. Ethics Panel II, Panel TBA

9:00-10:00 a.m. Bryan Tingle, Warren County Attorney, Crossing over from Defense to Prosecution

10:00-10:15 a.m. BREAK

10:15-11:15 a.m. Fred Scaletta, Department of Corrections, Sentencing in Iowa and Inmate Population

11:15-12:00 p.m. Keynote Speaker, Thomas P. Sullivan, Jenner & Block

12:00-12:15 p.m. Presentation of John Adams Award—2007 Recipient

12:15-1:15 LUNCH

1:15-2:15 p.m. Town Hall Meeting Panel I, Iowa Criminal Code Revisions—sentencing, Kevin McCarthy, Rick Olsen

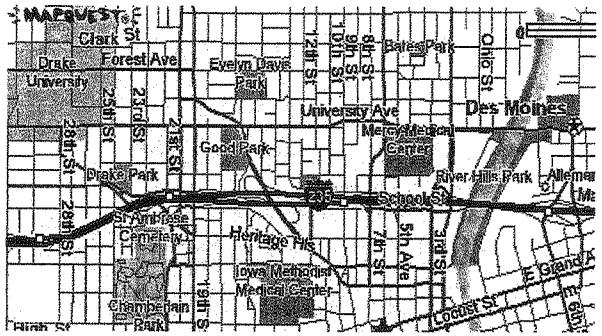
2:15-2:30 p.m. BREAK

2:30-3:30 p.m. Town Hall Meeting Panel II, Substantive Criminal Code Revisions

3:30-4:30 p.m. Town Hall Meeting Panel III, Criminal Procedure

There are a block of rooms reserved at the Hot
Fort Des Moines for $129.00 per night. There
access to the skywalk from the hotel. Please m
sure to mention that you are with the IACDL a
they will give you the discounted room rate.

Other hotels nearby are: Hotel Savery, Suites o
800 Locust Hotel, The Marriott, Embassy Suite
& Holiday Inn Downtown

The parking garage closest to the Ruan Buildin
located at: 7th & Grand. The daily fee is $8.00.

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