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.	**Use of Video for Mitigation at Sentencing** *Doug Passon* Federal Public Defender's Office Phoenix, Arizona
10:15 a.m. to 10:30 a.m.	**Break**
10:30 a.m. to 11:00 a.m.	**Recognizing Circuit Splits** *Webb Wassmer* CJA Attorney Simmons Perrine Moyer Bergman, PLC Cedar Rapids, Iowa
11:00 a.m. to 12:00	**Supreme Court & Eighth Circuit Update** *John Messina* Research & Writing Attorney Federal Public Defender's Office Des Moines, Iowa
12:00 p.m. to 1:15 p.m.	**Lunch (On your own)**
1:15 p.m. to 1:45 p.m.	***Montejo* Case** *B. John Burns* Assistant Federal Public Defender, Iowa
1:45 p.m. to 2:15 p.m.	**To Proffer or Not to Proffer** *Dean Stowers* Stowers Law Firm CJA Attorney West Des Moines, Iowa
2:15 p.m. to 3:00 p.m.	**Detention Hearings** *Bob Wichser* *Mike Smart* Assistant Federal Public Defenders, Iowa
3:00 p.m. to 3:15 p.m.	**Break**
3:15 p.m. to 4:15 p.m.	**Ethics** *N. Tre Critelli* Critelli Law Attorney Des Moines, Iowa

B. JOHN BURNS

EDUCATION: J.D., University of Iowa (1984); B.A., University of Iowa (1982)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (1999-Present); Assistant Des Moines Adult Public Defender (1994-1999); Assistant State Appellate Defender (1985-1994)

N. TRE CRITELLI

EDUCATION: J.D., Drake University Law School (1995); B.A., Loras College (1988)

PROFESSIONAL: Currently Vice-Chair of the Iowa Supreme Court Attorney Disciplinary Board and frequent speaker on Legal Ethics.

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EDUCATION: J.D., University of Chicago Law School (1989); B.A., Harvard College (1985)

PROFESSIONAL: Federal Public Defender, Northern and Southern Districts of Iowa (1999-Present); Assistant Federal Public Defender, Southern District of Iowa (1994-1999); Assistant Public Defender, Polk County Public Defender's Office (1991-1994); Law Clerk for the Honorable Donald E. O'Brien, U.S. District Court for Northern Iowa (1989-1991).

JOHN MESSINA

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DOUG PASSON - Phoenix, Arizona

Doug Passon attended Washington University School of Law and worked as a law clerk at the St. Louis office of the Federal Defender in 1995-96. After law school, he moved to Arizona where he began his practice as a Deputy Public Defender in Maricopa County (Phoenix). He then spent two years at a large Phoenix law firm working in the firm's white collar and criminal defense unit. He joined the Phoenix Office of the Federal Defender in 2002. Besides criminal defense, his other passions are screenwriting and filmmaking. He recently co-wrote an award-winning short screenplay entitled "Romey and Jules", which was produced into a short film and screened at the Phoenix and San Tan Film Festivals. He is currently in post-production on a short documentary entitled "A Letter of Thanks", which is a story about a young female soldier's service in the first Gulf War. For the last several years, he has been combining his love of film with his practice of law by producing short documentaries for use as mitigation at sentencing.

TIMOTHY S. ROSS-BOON

EDUCATION: J.D., University of Iowa (1987); B.A., University of Iowa School of Letters (1979)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2003 - Present); Assistant Public Defender, Linn County Public Defender's Office (1995 - 2003); Attorney with Linn County Advocate (1990 - 1995); Prosecutor with Johnson County Attorney's Office (1987 - 1990).

MIKE SMART

EDUCATION: J.D., Creighton University School of Law (1983); B.S., Creighton University (1976)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (2007-present); Sole practitioner in Omaha, Nebraska (2004-2007); Partner with White, Wulff & Smart (2000-2004); Partner with Teideman, Lynch Smart and Kampfe (1984-2000). Admitted in Iowa and Nebraska. While in private practice focused on Federal criminal defense, Federal civil rights litigation and general litigation.

DEAN STOWERS

EDUCATION: J.D., Drake University Law School (1989); B.A., University of Wisconsin-Madison (1986)

PROFESSIONAL: United States Sentencing Commission (1989-1990), Washington, D.C. Admitted before U.S. Supreme Court, 8th Circuit and 1st Circuit. Argued over 40 appeals and obtained favorable outcomes in 20% of those. Have tried dozens of federal and state criminal cases and have secured acquittals more than two-thirds of the time, including four federal acquittals in a row.

WEBB WASSMER

Mr. Wassmer joined Simmons Perrine Moyer Bergman PLC of Cedar Rapids in 1992 and became a member in 1998. Mr. Wassmer has a litigation practice, including federal criminal defense, and is admitted to practice before all state and federal courts in Iowa, the Eighth Circuit Court of Appeals, the Federal Circuit Court of Appeals and the United States Court of Federal Claims. He obtained his B.A. degree from Washington University in St. Louis in 1986 and his J.D. from the University of Pennsylvania Law School in 1989. From 1989 to 1991, Mr. Wassmer was a law clerk to the Honorable David A. Hansen, United States District Judge for the Northern District of Iowa and from 1991 to 1992 was a law clerk to the Honorable David A. Hansen, United States Circuit Judge for the Eighth Circuit Court of Appeals.

BOB WICHSER

EDUCATION: J.D., University South Dakota (1974); B.A., Morningside College, (1971)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (2003-Present); Assistant County Attorney, Pottawattamie County (2001-2003); Attorney with Sodow, Daly & Sodow, Omaha, NE (1985-2000); Attorney with Hirschbach & Wichser, Sioux City, IA (1976-1985); Assistant Attorney General, State of South Dakota (1974-1976)

ODDS AND ENDS

PRESENTED BY

NICK DREES
FEDERAL PUBLIC DEFENDER

New Amendments to the Guidelines
&
Sentencing Commission Priorities for Next Amendment Cycle

I. <u>Sentencing Guideline Amendments Effective November 1, 2009 (reader-friendly version of amendments' text available at www.ussc.gov).</u>

A. *Identity Theft Enforcement and Restitution Act of 2008.* Amendment responds to Congressional directive to the Sentencing Commission to increase penalties for identity theft. The amendment:

1. adds to USSG §2B1.1 a new 2-level enhancement for offenses involving personal information;
2. expands 2B1.1's definition of "victim" to include individuals who did not suffer pecuniary harm and expands the factors to be considered in calculating loss; and
3. provides an upward departure in the interception of communications guideline (2H3.1) if the offense involved personal information of a substantial number of people; and
4. clarifies the abuse of position of trust provision (3B1.3) to say the increase applies to those who exceed or abuse their authority to obtain or use a means of identification.

B. *Ryan Haight Online Pharmacy Consumer Protection Act of 2008.* The Act created two new offenses involving controlled substances, increased the statutory maximum sentences for all Schedule III and IV controlled substances and for second and subsequent Schedule V offenses, and added a sentencing enhancement for Schedule III offenses in cases where death or serious bodily injury resulted. The amendment

1. adds two new base offense levels for offenses in which death or serious bodily injury results;
2. increases maximum base offense levels for offenses involving hydrocodone;
3. addresses two new offenses–prohibition on dispensing controlled substances over the internet without a valid prescription and prohibition on using the internet to advertise for sale a controlled substance.

C. *Drug Trafficking Vessel Interdiction Act of 2008.* Act created a new offense making it unlawful to operate, attempt or conspire to operate, or embark in an unflagged submersible or semi-submbersible vessel in

international waters with intent to evade detection. The amendment

1. expands specific offense characteristics in §2D1.1 to include use of submersibles;
2. creates new guideline, §2X7.2, for this offense;
3. provides specific offense characteristics in §2X7.2 for failing to heave to, for attempting to sink the vessel, and for sinking the vessel.

D. *Court Security Improvement Act of 2007.* The Act directed the Commission to review the guideline, §2A6.1, that applies to threats to federal officials and determine whether the sentence should be increased if the threat occurs over the internet. The Commission decided that a two-level increase should apply if a defendant is convicted under 18 USC § 115 (influencing, impeding or retaliating against a federal official by threatening or injuring a family member), the threat was publicly communicated, and the defendant knew or should have known that a public threat created a substantial risk of inciting others to violate the statute. The Commission decided that the increase should apply regardless of the public means of communicating the threat (internet, radio, television).

E. *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.* Congress directed the Commission to amend the guidelines for alien harboring to ensure conformity with guidelines on promoting a commercial sex act if the harboring was committed in furtherance of prostitution and the defendant was an organizer, leader, manager, or supervisor. The amendment

1. adds increases to §2L1.1 if the above circumstances apply;
2. adds a new offense to §2B1.1–fraud in foreign labor contracting;
3. adds a new offense, benefitting financially from peonage, slavery and trafficking in persons, to §2H4.1.

F. Counterfeiting. Amendment to §2B5.1 addresses conflict in circuits regarding which guideline to apply in counterfeiting offenses that involve "bleached notes" (genuine U.S. currency stripped of its original image with chemicals and then reprinted to appear to be of higher denomination). The amendment

1. directs use of §2B5.1 for these offenses and
2. adds a prong to the enhancement for cases in which a defendant controls blank or partially blank bleached notes to make the punishment equivalent to those who control counterfeiting paper similar to a distinctive paper.

G. Influencing a Minor. Amendment addresses circuit conflict regarding undue influence enhancement in the guidelines on criminal sexual abuse of a minor under 16 and promoting a commercial sex act with a minor (§§2A3.2 and 2G3.1). Circuits split over two issues: (1) whether the undue influence increase can apply in a case involving attempted sexual conduct and (2) whether the increase can apply in a case in which the only "minor" involved is a law enforcement officer. The amendment says the increase can apply for attempted sex offenses, but it cannot apply when the only "minor" involved is a law enforcement officer.

H. Miscellaneous Amendments

1. Amendments to Appendix A (Statutory Index) to cover new offenses, including domestic assault by a person with two or more prior convictions for domestic assault offenses, 18 USC § 117, and child soldier offenses, 18 USC § 2442.
2. Amendment to §5F1.8 and other provisions to provide for intermittent confinement. "Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release." Intermittent confinement is available as a condition of supervised release only upon a violation, only during the first year of s.r., and only when facilities are available.
3. Amends specific offense characteristic in §2B1.1 to cover trafficking in a veteran's grave marker.
4. Amends child pornography guidelines to reflect changes to statutes that relate primarily to cases in which child pornography is transmitted over the internet. The term "distribution" includes "transmission," and the term "material" includes any visual depiction.

I. Commission of Offense While on Release. Clarifies §3C1.3 to provide that the court determines the applicable guideline range as it would in any other case for a defendant who committed an offense while on release.

1. Amendment also addresses a new child pornography offense that makes it unlawful to knowingly produce with intent to distribute or to knowingly distribute "child pornography that is an adapted or modified depiction of an identifiable minor." Offense carries maximum of 15 years and a base offense level 18.

J. *Prioritizing Resources and Organization for Intellectual Property Act of 2008.* Amendment responds to the Act, which increased the statutory

maximums for violations of 18 USC § 2320 (trafficking in counterfeit goods or services) when the offender causes or attempts to cause serious bodily injury or death.

II. U.S. Sentencing Commission Priorities for Amendment Cycle Ending May 1, 2010.

A. Continuing to solicit information on federal sentencing practices, including through ongoing regional public hearings.

B. Continuing to evaluate federal sentencing policy in light of *US v Booker* and other Supreme Court decisions. Process possibly includes evaluation of the decisions' impact on the guidelines, development of guideline amendments, recommendations for legislation on federal sentencing policy, study of and possible report to Congress on statutory mandatory minimum sentences and the safety valve, and a report on the appellate standard of review after *Booker*.

C. Review of departures within the guidelines.

D. Continued study and possible report on alternatives to incarceration, including a study of alternatives available at time of sentencing and consideration of potential changes to the sentencing zones.

E. Continued work with Congress on cocaine sentencing policy.

F. Continuation of multi-year study of the statutory and guideline definitions of "crime of violence," "aggravated felony," "violent felony," and "drug trafficking crime," including an examination of circuit conflicts on whether an offense categorically qualifies as one of these crimes.

G. Resolution of circuit conflicts.

H. Multi-year review of the guidelines' application to human rights offenses, including genocide, war crimes, torture and maiming to commit torture, and child soldier offenses.

I. Review of child pornography offenses, including review of the incidence of departures and variances from the guideline, compilation of studies on recidivism by child pornography offenders, and recommendations to Congress for statutory changes.

J. Consideration of miscellaneous guideline application issues, including clarification of the extent to which restitution is mandatory, examination of criminal history point calculations under §4A1.1(e).

K. Implementation of crime legislation enacted during the 111th Congress.

USE OF VIDEO FOR MITIGATION AT SENTENCING

PRESENTED BY

DOUG PASSON
FEDERAL PUBLIC DEFENDER'S OFFICE
PHOENIX, ARIZONA

MITIGATION AND THE MOVIES: USING MOVING PICTURES TO PUT YOUR CLIENT IN THE BEST LIGHT AT SENTENCING

Douglas A. Passon

We were like peas and carrots, Jenny and I.
~Forrest Gump, "Forrest Gump" (1996)

Like Forrest and Jenny, lawyers and movies go together like peas and carrots. In terms of entertainment, some of the most compelling movies and TV shows of our time are about lawyers and their causes. But can we as lawyers borrow from this medium to become better advocates? Absolutely. This is because good film makers and good lawyers share the same methods of persuasion. Like the best movies, the best court arguments are solidly constructed, have emotionally driven and universal themes, and withstand the test of time. A good film, like a good lawyer, has the power to move an audience - not just to laugh or cry, but to *act*.

Louis, I think this is the beginning of a beautiful friendship.
~Rick Blaine, "Casablanca" (1942)

In these days of e-courtrooms and user-friendly technology, the marriage of law and film was inevitable. Thus, when a case calls for it, a lawyer should seriously consider unfolding a director's chair, picking up a megaphone, and yelling, "Action!" Let's face it, when it comes time for sentencing, letters from family members or stumbling speeches only go so far. In certain cases, true persuasion calls for much more than a well-crafted pleading or a loquacious lawyer. Now, the availability of reasonably priced cameras and muscle-bound computers gives almost any individual the power to create moving pictures. It's not an entirely simple proposition, but it is certainly one within realistic reach. This article is designed to cover some basic tips on how to create a persuasive and professional-looking moving picture to benefit your client at sentencing.

We have a pool and a pond. The pond would be good for you.
~Ty Webb, "Caddyshack" (1980)

Obviously not every case or client warrants the use of this technique. In fact, it is better used sparingly. Using this technique too often or creating a poor "product" could diminish its effectiveness and prompt a backlash from judges or prosecutors. Thus, we should first discuss some situations where it might be worthwhile to create a moving picture for your case or client. This article focuses on the production of moving pictures for use at sentencing only, where wide-open rules for presenting mitigation materials make it a natural fit. That is not to say moving pictures have no place at other stages of the proceedings. The use of this technique is limited only by your imagination, your good judgment, and the rules of evidence.

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What characters? There's a bunch of little kids dressed up in animal costumes.
~Royal Tenenbaum, "The Royal Tenenbaums" (2001)

You will notice the liberal use of the term "moving pictures" in this article. To be sure, we are not just talking about creating pictures that have motion. That, of course, is the technical essence of film. The true goal of this process is to create pictures that have *emotion*. You will literally be using this as a tool to move your audience into action. In order for your picture to be *moving*, you must find the truth in your subject and portray it in such a way that has emotional resonance - all in an effort to persuade.

The most basic measure of when a moving picture may be appropriate is when you believe that some aspect of your client's circumstances are far better *shown*, than simply told. Moreover, the necessary ingredients to a good sentencing film are exactly the same as those that are essential to the creation of any good movie: **a good story**, **credible and compelling characters**, and **powerful images**. If you do not have all three of these things, this technique might be better saved for another case. Consider these examples:

I had a client in his mid-20s who was one of several defendants in a federal check forging conspiracy. His actions were driven by a terrible and long-standing drug addiction - among the worst I had ever seen. Over a year had passed since his initial arrest and in that time, he put himself through a six-month in-patient rehabilitation program. At the time of sentencing, not only was he drug-free for more than a year, but he was mentoring other addicts and speaking to large crowds about the horrors of drug addiction.

I knew I had a good story. Many of our clients go through rehab, but this young man's journey stood out from the rest. In addition, since he had achieved sobriety, the client was good-looking, up-beat, and very articulate. In other words, he was a great and persuasive "character" on film. However, in order to truly demonstrate his transformation, I needed visuals - powerful images to persuade the judge that my client's efforts at recovery were truly extraordinary.

I was able to track down all I needed with little effort. Among other things, I obtained discovery photos showing my client, ravaged by drugs, depositing his forged treasury checks into various check cashing machines. He knew the machines were taking his picture, but he was so far gone, he just didn't care - and this came through loud and clear in the images. I obtained a copy of my client's booking photo. From this photo, it appeared that my client had not slept in days. His eyes were two black holes and he was frighteningly thin. I layered these images over present-day images of my client, healthy and vital, telling the story of how when his mother visited him in jail after his arrest, she searched the visiting room and walked right past him because she no longer recognized her own son. These "before and after" images, backed up by the gut-wrenching narrative from my client, were undoubtedly the most emotionally powerful way to present the reality of my client's accomplishments to the court.

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Sure, I could have simply *told* the judge what he needed to know and backed it up with paper, like a graduation certificate or letters of recommendation. However, I knew it would be much more powerful to *show* this young man's exceptional recovery - especially since "extraordinary post-offense rehabilitation" is a basis for a sentence reduction. So, I submitted a very concise sentencing memorandum setting forth the legal basis for my request. In factual support of the memorandum, I attached the sentencing video as an exhibit in DVD format. The film was roughly ten minutes in length. My client received probation.

In another example, a colleague of mine represented an Iranian client who was granted asylum in the United States after escaping intense religious persecution (to be Christian in Iran is a life-threatening endeavor). He had been in the U.S. several years when he was accused of attempting to help other Iranians illegally cross the US-Mexico border using false visas. With the help of a dubious informant, the government attempted to paint the client as a professional alien smuggler. In addition, the political climate provided damning subtext - the black cloud of terrorism hung over the case.

Because so much bad information had been disseminated about the client, his lawyer knew it was imperative to show the judge who he really was. He was not a professional smuggler, he was a master tailor. He was a devoted family man - a single father raising two articulate and accomplished children - who remained loyal to the family he had left behind in Iran. He certainly was no terrorist - he was a man of faith in the truest sense. In reality, the client was simply trying to help members of his extended family escape similar persecution. He made a bad choice for the right reasons. Again, all of these things could have been told to the judge, but the case begged for a moving picture.

Good story? Most definitely. The client's account of being jailed and tortured by Iranian Mullahs for his religious beliefs, his harrowing journey to freedom, and the amazing life he built for himself and his children in America was, quite literally, something right out of the movies. Great characters? The client was warm and sincere, his children stole the show, his pastor and friends were compelling and articulate. Dynamic visuals? Absolutely. We were able to show him, among other things, hard at work in a high end clothing store and playing organ at bible study and at church. His eleven-year old daughter, a classically trained pianist, provided the soundtrack. We even tracked down a photograph of the prison in Iran where he was jailed. It was undoubtedly the most moving way to tell this client's story. While one cannot be certain it was solely due to the video, this client also received probation.

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Well, I have all your equipment in my locker. You should probably come get it 'cause I can't fit my nunchakus in there anymore.
~Napolean Dynamite, "Napolean Dynamite" (2004)

Assuming you've found the perfect case for a moving picture, you next need to make sure you have the right gear to move the project from idea to completion. Do you have a video camera and a few bucks for tape? After that, all you really need is a decent computer and some editing software. No one is expecting you to be Steven Spielberg. If you don't see yourself behind the camera or learning how to edit video on your computer, fret not. You can always find help or hire someone to assist you. However, if you have the do-it-yourself spirit, you will need the following items to begin making quality moving pictures:

It's like you're dreamin' about Gorgonzola cheese when it's clearly Brie time, baby.
~Hitchhiker, "There's Something About Mary" (1998)

❶ *Video Camera and Tapes*: If you are still using an analog camera, or have no camcorder at all, it's time to hang up your pelt, put down your club, and come into the 21st century. In other words, get a *digital* video camera. They are easy to use and reasonably priced. I have found the best cameras for the job use mini digital video cassette format (mini-DV, also known as DVC). Although there are newer digital formats (such as those that record to mini-DVDs or built-in hard drives), the mini-DV format is still the standard bearer, and the best format for editing video on computer. In addition, tape is cheaper and holds much more data. A high-quality mini-DV tape costs about $3.

In terms of what to look for when purchasing your digital video camera, I would offer the following suggestions. First, if your budget allows, consider spending a little extra money for a 3-CCD camera. Without getting too technical , a CCD is basically the chip in the camera that captures the images. Next to high-definition cameras, which are exponentially more expensive, 3-chip cameras will ensure the very best picture quality. Second, one of the big things that distinguishes cameras of similar price and quality is the diversity of their input and output jacks. Make sure the camera has, at the very least, an input for an external microphone and a FireWire connection for transferring the video to your computer. You will find that most of the lower-end consumer cameras will not have the jacks you need. The good news is you can get a solid 3-CCD mini-DV camera with all the right jacks for around $500.

You're about as useful as a poopie-flavored lollipop.
~Patches O'Houlihan, "Dodgeball: A True Underdog Story" (2004)

❷ *Microphone*: Believe it or not, sound quality is more important than picture quality. In most cases, your moving picture will include on-camera interviews. Unfortunately, the built-in microphone on most any camcorder will not work for interviews because it will pick up too much extraneous sound. Voices will be diluted and the extra background noise will distract from the emotional punch of the message. This is why, as stated above, your camera must have the capacity to connect an external mic.

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The best tool for the job is called a lavaliere. This is simply that small, clip-on microphone you often see people wearing on talk shows and news programs. You can find a suitable one for approximately $25.00. Also consider purchasing an extension cable (less than $10) to get a little more distance between the camera and your subject. If you are working with a larger budget, consider investing in a wireless lavaliere. However, if you skimp on cost with this item, your sound quality will suffer. A good quality wireless setup will be in the neighborhood of $500.

No, I'm not talking about digging up dead girls, Wyatt. I'm talking about your system, idiot, your computer
~Garry Wallace, "Weird Science" (1985)

❸ *Computer*: This is where the magic happens. You will eventually be loading all of your video footage into a computer and using some kind of editing software to edit out all the junk, add titles, transitions, and maybe even music to make your masterpiece. Video files can be very large and video editing programs require a fair amount of power. Thus, the general rule for computer video editing is the faster the computer, and the more memory, the better. Although most newer computers will have the specs needed for video editing, here are some general hardware guidelines:

- At the very least, you need a PC running a Pentium III and 512 MB of RAM;
- Ideally, you want to have an Intel Pentium (or compatible) processor of at least 1.3GHz and at least 1 gig of RAM;
- Approximately 20gb of open hard drive space;
- DVD+-R burner required for DVD creation;
- DV/i.LINK/FireWire/IEEE 1394 interface to connect your digital video camcorder;
- Video and sound cards/drivers that are compatible with Microsoft DirectX 9 or later. Video card should be at least 32mb;
- a decent color monitor; and
- a decent pair of speakers.

Consider purchasing an external hard drive to store your video footage. You will be surprised how fast your existing hard drive fills up with large video files. Hard drives are continually coming down in price. Right now you can find a good 250 gig external drive for less than $150.

I ordered some spaghetti with marinara sauce, and I got egg noodles and ketchup.
~Henry Hill, "Goodfellas" (1990)

❹ *Video Editing Software*: You might not need to look any further than your computer's program file to find basic video editing software. Windows XP comes with a video-editing program called Windows Movie Maker. This program will allow you to do simple video edits, including adding titles, transitions, basic after-effects, and an audio track. Although Movie Maker is a good way to begin to acquaint yourself with editing techniques, you will quickly find this program to be more like egg noodles and ketchup than spaghetti with marinara. In my opinion, Movie Maker is not capable of outputting videos of the quality and length contemplated here.

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When you are ready to purchase an editing program, you can find them from under $50 to well over $1000. On the low-end are consumer-grade video editing programs such as Pinnacle, Roxio, or Ulead. High-end, professional-grade programs include Avid, Final Cut, or Adobe Premiere. A good listing of various programs can be found at the PC Magazine website (http://www.pcmag.com/category2/0,1738,4835,00.asp). Many software companies offer free trial downloads of their editing programs, so you can try before you buy. I edited my first sentencing movie using a free download of Adobe Premiere Pro. When my trial version expired and it came time to make a purchase decision, I settled on Adobe Premiere Elements. This is a scaled down version of Adobe Premiere Pro that has strong capabilities, from editing to DVD authoring, and costs less than $100.

You may notice I have yet to give any attention in this article to Apple computers or software. This is not a statement on their quality or usefulness, but merely a reflection of the fact that most lawyers aren't using Macs. In fact, many industry professionals prefer Macs for use in video production. If you are a Mac user, your computer probably came with an editing program called iMovie. This is a far more capable program than its Windows counterpart. You may even be able to complete your sentencing video with iMovie alone - give it a try.

It's 106 miles to Chicago, we've got a full tank of gas, half a pack of cigarettes, it's dark, and we're wearing sunglasses – Hit it.
~Elwood and Jake Blues, "The Blues Brothers" (1980)

Now that you know when it is appropriate to do a video and what gear you need, it's time to learn a little bit about how to pull it off. The purpose of this last section is to offer you some largely non-technical advice to help you make your movie. There is not enough room here to cover the technical aspects of film making, such as sound, lighting, shot composition, editing techniques, and so forth. However, many excellent books have been written regarding those subjects. I have found the following to be very helpful resources: Brian Michael Stoller, *Filmmaking for Dummies* (Wiley Publishing 2003) and Michael W. Dean, *$30 Film School* (Thompson 2nd ed. 2006). Of course, the Internet is a great (free) resource as well.

My friends call me Ox. I don't know if you've noticed, but I got a slight weight problem.
~Dewey Oxburger, "Stripes" (1981)

Just as it was John Candy's motivation in *Stripes* to become "a lean, mean fighting machine," so too should it be your goal to keep your moving pictures as trim and as interesting as possible. In the world of movie-making, there is no greater sin than to bore your audience. The longer your movie, the more chance that the judge will lose interest and ignore your message. Your hard work will be wasted, the whole process could quickly earn a bad reputation and, most important, your client could suffer the consequences. Although some situations may call for longer presentations, try to limit the length of your movie to between five and fifteen minutes.

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A lean and mean movie does not meander. The mark of a good movie is that it has a **central theme, with all aspects of the presentation revolving around that theme**. The next time you watch a truly great film, notice how virtually every scene and every line of dialogue not only moves the story forward, but serves the central theme of the picture. Look closer and notice that even subplots serve the main theme. Thus, in order to tell a good story and keep the presentation lean, a sentencing movie should be crafted in the same way. In the above example concerning the Iranian client, the theme or spine of the film was seemingly broad: "Who is Mr. Client?" Although the film touched on many different aspects of our client's life, each part was crafted toward a very narrow purpose: to convince the judge that our client was not a professional smuggler or a terrorist, but instead had the very best intentions for doing what he did - to help his family escape persecution.

A major benefit of using this medium is that it gives you total control to trim away the fat often present in traditional sentencing presentations. As we all know, our clients and those who speak on their behalf (including their lawyers) often lack the ability to be brief and to the point. In addition, there is the concern that, when the time comes, a person will not able to properly articulate themselves, especially when so much is riding on their words. With this process, people can say what needs to be said in a much more relaxed setting, with however many takes they need to get it right. Then, with simple editing, all the extraneous stuff can be cut away to create the "leanest and meanest" message possible. Not only does this process make for a more powerful sentencing presentation, but it can also shorten the length of sentencing hearings - something judges will undoubtedly appreciate.

It should be noted, however, that even a short sentencing video can seem long if it is not visually dynamic. In other words, as mentioned earlier, your movie should contain compelling images, as opposed to just a parade of "talking heads." Although you will undoubtedly need people to speak on camera, your challenge is to be creative about how you convey that information in the final form.

One of the best ways to spruce up "talking head" footage is to make sure your moving picture contains plenty of "B-roll." B-roll consists of images you cut to while a person is talking, typically to supplement their message in some fashion. For example, you may have footage of your client talking about what he does at work. The B-roll would be footage of the client actually *at* work engaged in some (hopefully interesting) activity. Later, in the editing process, you can easily combine the two clips so that you hear the character talking, but you see the character in *action*. Still photographs are another great way to spice up the visual mix. If your client is talking about his childhood, cut away to a photo of him as a kid. Remember, to the extent possible, this process is about *showing*, not just telling. If there's not much action, and nothing much interesting to look at, then no matter what the length of your final presentation, it will move at a snail's pace.

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Pay no attention to that man behind the curtain!
~The Wizard of Oz, "The Wizard of Oz" (1939)

As a film maker, you become the Wizard. Arguably any attempt at persuasion involves a modicum of manipulation. You are trying to tap into emotions to deliver your message and achieve a result. However, all film audiences have stink-detectors. They know when the story doesn't hold up, they know when they are being manipulated, and they won't put up with it for long.

In order to make the viewer forget the man behind the curtain, you need to be subtle in your methods of persuasion. You simply cannot afford to be cheesy, overtly manipulative, or over the top. Including the song "Born Free" on your soundtrack would be a nice example of all three. Gratuitous scenes of crying loved ones, in the absence of any other purpose other than to tug on heart strings is also a recipe for disaster. Avoid dramatic voice-over narration and goofy editing effects. Such techniques can wreck credibility and distract from the message of the film. And, although it goes without saying: never use the editing process to portray statements out of context or to otherwise abuse the truth. Keep in mind, especially when filming your client, a contentious prosecutor (more than likely one who becomes suspicious of your editing choices) could request and likely receive an order for disclosure of your unedited footage.

When you have finally assembled all the pieces into something resembling a movie, you need to test whether you have properly fulfilled your role as Wizard. In the same way you would ask your colleague, your assistant, or your spouse to proofread an important brief, so too should you be asking those people to watch your movie. You need fresh eyes and ears to tell you what works and what doesn't. A test audience will tell you what parts of your movie can be trimmed and can give other suggestions about how to improve your final product. So, make sure you finish your movie far enough in advance of sentencing so that you have time to screen it and make any necessary adjustments.

Gentlemen, you can't fight in here! This is the War Room!
~President Merkin Muffley, "Dr. Strangelove" (1964)

Hopefully, your attempt to introduce a sentencing video on behalf of your client will not be met with resistance from either the prosecutor or the judge. However, as the technique gains in popularity and effectiveness, worried prosecutors might start putting up a fight. In addition, there may be occasional concerns about appearing before a Judge who may be irrationally resistant to the use of this method of persuasion in his courtroom. The good news is, if the need arises, a federal or state practitioner has many weapons at his disposal to fight this battle and convince the court that this is a perfectly acceptable form of mitigation.

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Don't mess with the bull, young man. You'll get the horns!
~Principal Richard Vernon, "The Breakfast Club" (1985)

Arizona law provides many avenues to refute challenges against the use of movies as mitigation at sentencing. The Arizona Rules of Criminal Procedure require a court to conduct a sentencing hearing. Ariz.R.Crim.Pro., R. 26.7(a). Moreover, the rules mandate that at such a hearing, "any party may introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances, to show why sentence should not be imposed, or to correct or amplify the pre- sentence, [or other] reports." Ariz.R.Crim.Pro., R. 26.7(b). A well-crafted sentencing movie will contain only reliable and relevant evidence. Under the plain language of the rule, it makes no difference that your video is loaded with hearsay (pre-sentence reports, sentencing memorandum, and sentencing hearings are chock-full of hearsay anyway!). Not only is hearsay acceptable, but the law is clear that the judge is not required to follow *any* rules of evidence in mitigation and aggravation hearings. *See, e.g., State v. Donahoe* (App. 1977) 118 Ariz. 37, 574 P.2d 830.

If a prosecutor complains they have not had an opportunity to interview or cross-examine the witnesses appearing in the video, the court should be reminded that if a defendant made such a complaint, the government would most certainly respond by citing to post-*Crawford* cases stating that the right to confront is not generally applicable at a sentencing hearing. *e.g., State v. McGill*, 213 Ariz. 147, 140 P.3d 930 (Ariz. 2006). What's good for the goose must certainly be good for the gander. Moreover, as a courtesy, you will have disclosed a copy of your movie in advance of sentencing. If the prosecution was so inclined, it could have located and interviewed the witnesses in the video, or presented other testimony or evidence to counter the information.

Why don't you go outside and jerk yourself a soda?
~Virginia Hill, "Bugsy" (1991)

For those of you looking to introduce sentencing videos in federal court, you will have perhaps even more ammunition to fend off any judicial or prosecutorial attempts to thwart your creative genius. Under the federal rules, before imposing sentence, the court "must" not only allow the defense lawyer to speak, but it must also allow the defendant to "speak or present **any information** to mitigate the sentence." Fed. R. Crim. Pro., R. 32(i)(4)(emphasis added). If that provision isn't convincing enough, point the parties to 18 U.S.C. § 3661, which states that "**[n]o 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." Given the amazingly expansive language contained in these provisions, it would be hard to imagine a situation where a court could reasonably preclude the defense from presenting this information as mitigation at sentencing.

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For the prosecutor who is irked about the potential evidentiary issues associated with the information contained in the video, the federal rules of evidence very clearly state that the rules of evidence do *not* apply to sentencing proceedings. Fed.R.Evid., R. 1101(d)(3). As it is true in the state level, federal cases which detrimentally limit a defendant's right to confront at sentencing, can and should be used with equal force against the government (assuming it ever had a right to confront in the first place). *See, e.g., U.S. v. Littlesun*, 444 F.3d 1196, (9th Cir. 2006)(Right to confront not generally applicable at sentencing hearing).

It appears the only requirements federal courts have seen fit to impose on information presented at sentencing, is that the information must bear "minimal indicia of reliability" and there must be an "opportunity to refute". *e.g., U.S. v. Giltner*, 889 F.3d 1004 (11th Cir. 1989). Note, however, that these requirements are usually imposed as minimal due process protections for the defendant, and it may be questionable whether the government is entitled to any similar protections. Again, if your video is done right, it will not run afoul of the reliability standard, and pre-sentence disclosure of the video should prevent the government from claiming it lacks the opportunity to refute.

In the end, you should be able to break through the wall of any potential objections to the use of videos as mitigation at sentencing. However, although the rules will enable you to lead the horse to water, only a compelling, well-crafted finished product will convince him to drink.

My country send me to United States to make movie-film. Please, come and see my film. If it not success, I will be execute.

~Borat Sagdiyev, "Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan" (2006)

It is no secret that well-crafted movies have enormous power not just to entertain, but to inform and persuade. Adapting this medium for use in court proceedings is not an entirely new concept. However, it is one that is gaining momentum as it becomes easier and cheaper for an attorney to produce their own professional-looking product. Having the right tools for the job is just the beginning. After that, you need to fill your movie with compelling stories, dynamic characters, and powerful visuals. When done properly and in the right case, an emotionally charged moving picture can be the most effective way to accomplish your client's sentencing goals.

~The End ~

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RECOGNIZING CIRCUIT SPLITS

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CIRCUIT SPLITS
OR
HOW TO MAXIMIZE YOUR CHANCE OF ARGUING BEFORE THE SUPREME COURT[1]

I. INTRODUCTION

The Circuits sometimes disagree. Determining whether your case presents an issue upon which the Circuits disagree can provide some of the most fertile grounds for argument in your case.

First, there are a few issues on which the Eighth Circuit has taken inconsistent positions in different panel opinions, discussed in Section II. Those issues may someday been taken up by the Court *en banc*. *See* Fed. R. App. P. 35(a)(1) (*en banc* consideration is appropriate when "necessary to secure or maintain uniformity of the court's decisions.").

Second, if the Eighth Circuit has not yet taken a position, you can influence which position the District Court and the Eighth Circuit take. The issues set forth in Section III fall into this category.

Third, if the Eighth Circuit has taken a position unfavorable to the one which benefits your client, you have grounds to argue for *en banc* review. This is particularly true if the Eighth Circuit opinion is an older one and the recent trend in other Circuits is more favorable. Conversely, if the Eighth Circuit has taken a favorable position, you may need to be prepared for an argument that the Eighth Circuit should change the law. The cases discussed in Section IV are ones in which the Eighth Circuit has taken a position.

Finally, since one of the grounds on which the Supreme Court may grant certiorari is conflict between the Circuits, *see* Supreme Court Rule 10(a), it is in your client's interests to keep the issue alive and preserved, even if the Eighth Circuit position is presently adverse, in the event that the Supreme Court takes up the issue (perhaps in your case) and reaches a favorable result.

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Disclaimer: This outline is not intended to be either a comprehensive list of all circuit splits which presently exist or a full and complete discussion of each issue presented. As always, you should conduct your own independent research or hire someone to do it for you.

II. WHERE THE EIGHTH CIRCUIT HAS TAKEN INCONSISTENT POSITIONS IN PANEL CASES

A. The Law of Inconsistent Panel Decisions

In the Eighth Circuit, when there is an intra-circuit split, the panel is free to select which line of cases it wishes to follow. *See Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n.8 (8th Cir. 1995); *Toua Hong Chang v. Minnesota*, 521 F.3d 828, 832 n.3 (8th Cir. 2008).

Oddly, this rule itself creates a conflict with other Circuits. Other Circuits apply the rule that, when two panel decisions conflict, the panel decision first in time controls subsequent cases. *See, e.g., McMellon v. United States*, 387 F.3d 329, 332-33 (4th Cir. 2004) (en banc); *Hiller v. Oklahoma*, 327 F.3d 1247, 1251 (10th Cir. 2003); *Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir. 1998); *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988); *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1166 (5th Cir. 1984); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981).

Query: Since a panel is bound by prior panel decisions, *see Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002) ("[I]t is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel."), why does the fact that a second panel to decide the issue ignored the opinion of the first panel to decide it give the third panel addressing the question the authority to decide whatever it wants?

B. Whether Bad Faith Allows the Court to Compel the Government to Make a Motion for Downward Departure Based on Substantial Assistance

In *United States v. Perez*, 526 F.3d 1135 (8th Cir. 2008), the Eighth Circuit noted an intra-circuit split on "whether bad faith is an additional basis for compelling a motion for downward departure based on substantial assistance." The other grounds for a district court's review of the government's refusal to make a substantial assistance motion are "if such refusal (1) was prompted by an unconstitutional motive, such as the defendant's race or religion; or (2) was not rationally related to a legitimate government interest." *Id.* The ultimate holding of *Perez* on this issue was that, even if bad faith is a permissible ground, Perez had not show it.

An early Eighth Circuit case to address this issue was *United States v. Kelly*, 18 F.3d 612, 617-18 (8th Cir. 1994). The Eighth Circuit stated that "[s]ome limited exceptions to this rule [that the sentencing court cannot grant a downward departure absent a Government motion] exist, providing that relief may be granted absent a government substantial assistance motion if a defendant shows that the government's refusal to make the motion was based on an unconstitutional motive, that the refusal was irrational, or that the motion was withheld in bad faith." Bad faith was not specifically at issue in *Kelly* as Kelly only asserted that the Government had acted irrationally. Other cases mentioning "bad faith" are *United States v. Wolf*, 270 F.3d 1188, 1190 (8th Cir. 2001), and *United States v. Rounsavall*, 128 F.3d 665, 667-68 (8th Cir. 1997).

Contrary to those authorities, the Eighth Circuit stated in *United States v. Moeller*, 383 F.3d 710, 712 (8th Cir. 2004), that "bad faith is not a constitutional standard" and only an unconstitutional motive for the prosecutor's refusal to file a substantial assistance departure motion allows the sentencing court to depart absent a motion.

C. *Appeal of Adequacy of Factual Basis After Entry of Unconditional Guilty Plea*

In *United States v. Cheney*, 571 F.3d 764 (8th Cir. 2009), the Eighth Circuit noted an intra-circuit split, as well as a split in the Circuits, as to whether a defendant may appeal the adequacy of the factual basis for a conviction after entry of an unconditional guilty plea. Federal Rule of Criminal Procedure 11(a)(2) sets forth the procedure for entering a conditional guilty plea.

In *United States v. Marks*, 38 F.3d 1009, 1012-13 (8th Cir. 1994), the Eighth Circuit reviewed the adequacy of the factual basis after an unconditional guilty plea. However, in *United States v. Beck*, 250 F.3d 1163, 1165 (8th Cir. 2001), the Court held that a defendant who entered an unconditional guilty plea had waived his right to appeal the sufficiency of the factual basis for the conviction.

In *Cheney*, the Court concluded that it need not decide this issue because the United States did not contend that the guilty plea barred the defendant from challenging the factual basis, *i.e.*, the United States had waived waiver. Accordingly, the Court proceeded to address the issue on the merits, finding that a sufficient factual basis for the plea had been established.

Three of the other Circuits have found no waiver of the right to appeal the factual basis for a plea with an unconditional guilty plea. *See United States v. Lacey*, 569 F.3d 319, 323 (7th Cir. 2009); *United States v. Baymon*, 312 F.3d 725, 727-

28 (5th Cir. 2002); *United States v. McKelvey*, 203 F.3d 66, 69-70 (1st Cir. 2000). Three Circuits have found waiver. *See United States v. Johnson*, 89 F.3d 778, 784 (11th Cir. 1996); *United States v. Willis*, 992 F.2d 489, 490 (4th Cir. 1993); *United States v. Freed*, 688 F.2d 24, 25-26 (6th Cir. 1982).

With the Eighth Circuit having inconsistent prior precedent and with the majority of the Circuits taking a position and being evenly split, this is an issue which has favorable conditions for *en banc* review by the Eighth or a grant of certiorari by the Supreme Court. Note that the cases allowing review are of more recent vintage than the cases finding a waiver.

D. *Standard of Review for Sophisticated-Means Enhancement Under U.S.S.G. § 2B1.1(b)(9)(C)*

U.S.S.G. § 2B1.1(b)(9)(C) provides for a two-level enhancement if the theft/fraud/etc. "offense otherwise involved sophisticated means."

There is inconsistent Eighth Circuit authority on whether a District Court's finding that sophisticated means was used is reviewed for clear error or reviewed *de novo*. *See United States v. Anderson*, 349 F.3d 568, 570 (8th Cir. 2003) ("We review the factual finding of whether a [fraud] scheme qualifies as 'sophisticated' for clear error." (quoting *United States v. Brooks*, 174 F.3d 950, 958 (8th Cir. 1999)), and *United States v. Finck*, 407 F.3d 908, 913 (8th Cir. 2005) ("We therefore review *de novo* 'whether the district court correctly applied the guidelines when it determined those facts constituted sophisticated means.'" (quoting *United States v. Hart*, 324 F.3d 575, 579 (8th Cir. 2003)).

The Eighth Circuit recognized the inconsistency in *United States v. Jenkins*, 578 F.3d 745, 751 (8th Cir. 2009), but concluded that even under the more exacting *de novo* standard, the use of sophisticated-means had been shown.

III. CIRCUIT SPLITS IN WHICH THE EIGHTH CIRCUIT HAS NOT TAKEN A POSITION

A. *Whether 18 U.S.C. § 2525 Permits a Clean Hands Exception to the Exclusionary Rule for Privately Obtained Illegal Wiretaps*

Title 18, U.S.C., § 2511, prohibits, among other things, the interception/ taping of a telephone conversation by a person not a party to the conversation. Section 2515 provides:

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

The issue is whether the United States may use an illegally intercepted communication as substantive evidence when the United States had no role (*i.e.* "clean hands") in the interception, for example when the conversation is illegally taped by a vengeful employee or disgruntled spouse.

Only the Sixth Circuit has found that a "clean hands" exception applies. *See United States v. Murdock,* 63 F.3d 1391, 1404 (6th Cir. 1995). *Murdock* reasons that, applying a Fourth Amendment type analysis, where the Government was not involved in the illegal interception, suppression would have no deterrent effect on the Government.

The Fourth, First, Third and Ninth Circuits, primarily based on the plain and unambiguous language of § 2515, refuse to read in a "clean hands" exception. *See United States v. Crabtree,* 565 F.3d 887 (4th Cir. 2009); *Chandler v. United States Army,* 125 F.3d 1296, 1302 (9th Cir. 1997); *In re Grand Jury,* 111 F.3d 1066, 1079 (3d Cir. 1997); *United States v. Vest,* 813 F.2d 477, 481 (1st Cir. 1987). These Circuits also look to the policy behind § 2515, which is to broadly protect privacy. Additionally, "[a] vengeful former employee or estranged spouse might well intercept private conversations with the fervent hope of discovering information that might land the reviled employer or spouse in jail" and allowing the Government to use those illegally intercepted conversations would indirectly give the interceptor what he/she could not directly receive. *Crabtree,* 565 F.3d at 891.

Note, however, that all of the Circuits addressing the issue have concluded that the Government may use an improperly intercepted communication for impeachment purposes, as opposed to substantive evidence, because of the way the law distinguishes between impeachment and substantive evidence. *See Crabtree,* 565 F.3d at 891-92 (citing cases). *See also United States v. Baftiri,* 263 F.3d 856, 858 (8th Cir. 2001) (holding illegally intercepted communication can be used for impeachment - communication was not offered as substantive evidence).

B. *Standard of Review for Fourth Amendment Curtilage Determination*

"[C]urtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." *Oliver v. United States*, 466 U.S. 170, 180 (1984). Various Fourth Amendment issues can arise which present the question of where the line for curtilage is drawn by the District Court. The Circuits are split on whether the drawing of that line is a legal question, reviewed *de novo*, with antecedent factual findings reviewed for clear error, or is a factual question, reviewed only for clear error.

Taking the position that the curtilage determination is a legal question are the Second, Fourth, First, and Ninth Circuits. *See United States v. Hayes*, 551 F.3d 138 (2d Cir. Vt. 2008); *United States v. Breza*, 308 F.3d 430, 435 (4th Cir.2002); *United States v. Diehl*, 276 F.3d 32, 38 (1st Cir.2002); *United States v. Johnson*, 256 F.3d 895, 911-913 (9th Cir.2001).

Taking the position that the curtilage determination is a factual question are the Third and Tenth Circuits. *See United States v. Benish*, 5 F.3d 20, 24 (3d Cir.1993); *United States v. Swepston*, 987 F.2d 1510, 1513 (10th Cir.1993).

C. *Subjective Intent for Liability under National Firearms Act as to Whether "Destructive Device" is "Designed as a Weapon"*

In *United States v. Spoerke*, 568 F.3d 1236 (11th Cir. 2009), the issue presented was whether homemade pipe bombs possessed by Spoerke were "destructive devices" within the meaning of the National Firearms Act, 26 U.S.C. § 5801, et seq. Spoerke was convicted of conspiracy to make destructive devices, unlawfully making destructive devices and possession of unregistered destructive devices. Part of the definition of a "destructive device" is that it is "designed . . . for use as a weapon." 26 U.S.C. § 5845(f). Spoerke asserted that the pipe bombs he possessed were not weapons, but rather intended for social enjoyment. He detonated them only underwater, and he enjoyed the concussion of the devices when detonated.

The Circuits are split over whether the court should consider the subjective intent of the defendant when determining whether the device was designed as a weapon. *Compare United States v. Oba*, 448 F.2d 892, 894 (9th Cir.1971) (considering the defendant's subjective intent), *with United States v. Posnjak*, 457 F.2d 1110, 1118-20 (2d Cir.1972) (applying an objective standard to determine whether the device falls within the reach of the Firearms Act), *and*

United States v. Johnson, 152 F.3d 618, 628 (7th Cir.1998) (adopting a mixed standard).

In *Spoerke,* although the district court instructed the jury on the mixed standard, the Eleventh Circuit declined to adopt a standard because the evidence of Spoerke's intent, under any standard, was sufficient to sustain his conviction.

D. *Nature of Purpose Necessary to Support a Conviction Under Federal Maintaining Drug-Involved Premises Statute*

Title 21, U.S.C., § 856(a)(1) makes it a crime to "knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance."

The Circuits have split on interpretation of "purpose." The Tenth Circuit has held that "at least in the residential context, [] the manufacture (or distribution or use) of drugs must be at least one of the primary or principal uses to which the house is put." *United States v. Verners,* 53 F.3d 291, 296 (10th Cir. 1995). The Fifth Circuit has held that this section "does not require that drug distribution be the *primary* purpose, but only a significant purpose." *See United States v. Soto-Silva,* 129 F.3d 340, 346 n.4 (5th Cir. 1997).

See also Primary, Significant, or Merely More Than Incidental: What Level of Intent Does the Federal Drug-Involved Premises Statute Really Require?, 35 N.E. J. on Crim. & Civ. Con. 177 (2009)

E. *Must the Defendant Know that the Principal is a Felon in Order to Be Convicted of Aiding and Abetting a Felon in Possession of a Firearm?*

Aiding and abetting requires proof of: (1) an act by the defendant contributing to the commission of a crime; and (2) an intent to aid in the commission of the crime. When the crime is possession of a firearm by a felon, must the aider and abettor know that the principal actor is a felon?

The Ninth Circuit has held that the government need not show that the defendant knew the principal was a felon. *See United States v. Canon,* 993 F.2d 1439, 1442 (9th Cir.1993); *United States v. Graves,* 143 F.3d 1185, 1188 (9th Cir.1998). The Seventh Circuit has held that the aider and abettor need only share the principal's knowledge that the principal possessed a gun. *See United States v. Moore,* 936 F.2d 1508, 1527-28 (7th Cir.1991). These cases reason that

because the "required state of mind" for a principal's violation of 18 U.S.C. § 922(g) is that the principal "knowingly possessed the gun," the Government must only prove that the aider and abettor knew the principal possessed the gun. *See Moore*, 936 F.2d at 1526-28.

The Third Circuit and the Sixth Circuit have held that the government must prove that the aider and abetter knew or had reasonable cause to know that the principal is a felon in order to sustain an aiding-and-abetting conviction. *See United States v. Xavier*, 2 F.3d 1281, 1286 (3d Cir.1993); *United States v. Gardner*, 488 F.3d 700, 714-15 (6th Cir. 2007). These Courts reason that, since it is the firearm possessor's status as a felon which gives rise to liability, the Government should be required to prove that the aider and abettor knew of the principal's status as a felon. *See Gardner*, 488 F.3d at 715. The principal can be presumed to know his status as a felon, but it should not be presumed that the aider and abettor knows the principal is a felon. *Id.*

See also Note: A Shot at Mens Rea in Aiding and Abetting Illegal Firearms Possession, 7 Ave Maria L. Rev. 639 (2009)

F. Interplay Between Rule of Evidence 414 and Rule 403

Federal Rule of Evidence 414 permits evidence of prior child molestation offenses in a prosecution for child molestation as an exception to the general rule of Rule 404(b) that evidence of prior crimes may not be used as propensity evidence. Rule 403, however, may still prohibit introduction of such evidence.

The Fourth Circuit outlined the issue as follows:

> [A]s is true of all admissible evidence, evidence admitted under *Rule 414* is subject to *Rule 403*'s balancing test. *See United States v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998).* Thus, even if a prior conviction qualifies for admission under *Rule 414*, evidence of that conviction may nonetheless "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to the defendant. *Rule 403, Fed. R. Evid.* In applying the *Rule 403* balancing test to prior offenses admissible under *Rule 414*, a district court should consider a number of factors, including (i) the similarity between the previous offense and the charged crime, (ii) the temporal proximity between the two crimes, (iii) the frequency of the prior acts, (iv) the presence or absence of any intervening acts, and (v) the reliability of

> the evidence of the past offense. *See United States v. Hawpetoss, 478 F.3d 820, 825-26 (7th Cir. 2007)* (citing *United States v. LeMay, 260 F.3d 1018, 1027-29 (9th Cir. 2001)).* [3] Importantly, we defer to the district court's *Rule 403* balancing using these or other factors "unless it is an arbitrary or irrational exercise of discretion." *United States v. Heater, 63 F.3d 311, 321 (4th Cir. 1995)* (quoting *Garraghty v. Jordan, 830 F.2d 1295, 1298 (4th Cir. 1987).*
>
> [3]There is a circuit split on whether a district court must address these or other specific factors and make findings. The Ninth Circuit requires this, whereas the Seventh Circuit adopts a more flexible approach and does not dictate a specific analysis. *Compare LeMay, 260 F.3d at 1027-28, with Hawpetoss, 478 F.3d at 825-26.* Although disposition of this case does not require choosing between these views, the Seventh Circuit's more flexible approach seems preferable in view of this circuit's general view that a district court has "wide discretion" in admitting or excluding evidence under *Rule 403. See United States v. Heyward, 729 F.2d 297, 301 n.2 (4th Cir. 1984).* This deferential standard reflects the fact that "a district court is much closer than a court of appeals to the 'pulse of a trial.'" *See United States v. Russell, 971 F.2d 1098, 1104 (4th Cir. 1992).*

United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007).

G. *U.S.S.G. § 2T1.1(c)(2)(A) - Does Definition of "Tax Loss" Require Subtractions for Deductions?*

U.S.S.G. § 2T1.1(c)(2)(A) provides:

> If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

Three Circuits have held that the sentencing court need not credit the defendant with deductions that the defendant could have taken if a tax return had been filed. *See United States v. Delfino*, 510 F.3d 468, 473 (4th Cir. 2007); *United States v. Chavin*, 316 F.3d 666, 679 (7th Cir. 2002); *United States v. Spencer*, 178 F.3d 1365, 1368 (10th Cir.1999).

The Second Circuit has concluded that § 2T1.1(c)(1)(A) requires the calculation of deductions, based on the "unless a more accurate determination of the tax loss can be made" language of the Guideline. *See United States v. Gordon*, 291 F.3d 181, 187 (2d Cir.2002).

See also Comment: Disputed Deductions: Delfino and the Fourth Circuit's Prudent Adoption of the Restrictive Approach to Tax Evasion Sentencing, 87 N.C. L. Rev. (2008)

H. Grouping of Fraud and Tax Offenses Under U.S.S.G. § 3D1.2(c) or (d)

When a perpetrator of fraud fails to report the illegal income on his or her tax return, the perpetrator can be charged with both fraud and tax offenses. The question arises whether the "amount of loss" for each offense is sufficiently related so that the offenses should be grouped.

U.S.S.G. § 3D1.2 provides:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
> . . .
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

The Fifth Circuit has approved grouping, reasoning that U.S.S.G. § 2T1.1(b)(1) provides for a two-level increase "[i]f the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity," and, thus, the fraud amounts are accounted for as a specific offense characteristic of the tax guideline. *See United States v. Haltom*, 113 F.3d 43, 45-46 (5th Cir.1997).

The Seventh, First, Third and Tenth Circuits disagree, finding that the counts do not involve "substantially the same harm" because the harm in the fraud count is to the fraud victim, while the harm in the tax count is to the United States and its taxpayers. *See United States v. Vucko*, 473 F.3d 773 (7th Cir. 2007); *United States v. Martin*, 363 F.3d 25, 41-43 (1st Cir.2004); *United States v. Astorri*, 923 F.2d 1052, 1056 (3rd Cir. 1991); *United States v. Peterson*, 312 F.3d 1300, 1302-04 (10th Cir. 2002).

In *United States v. Shevi*, 345 F.3d 675, 680-81 (8th Cir. 2003), the Eighth Circuit partially decided the issue. The Court held that the tax and fraud counts should not be grouped under § 3D1.2(d) because the offenses do not involve offenses "of the same general type." The Court determined that it need not take a position on whether the counts should be grouped under § 3D1.2(c) "because the offense level for Shevi's tax fraud counts was not increased based upon his conduct that was punished as mail fraud."

I. *How Do You "Use" a Minor in the Commission of an Offense?*

U.S.S.G. § 3B1.4 provides that "[i]f the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels." Application Note 1 states that "'[u]sed or attempted to use' includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting."

The Circuits have split on whether "use" means that the defendant must have committed some affirmative act to involve the minor in the commission of the offense or whether this adjustment applies to a defendant, not personally engaging a minor in criminal conduct, if a co-conspirator's use of a minor was reasonably foreseeable.

Three Circuits allow the enhancement when use of a minor by a co-conspirator was "reasonably foreseeable" to the defendant. *See United States v. Lewis*, 386 F.3d 475, 479-80 (2d Cir.2004); *United States v. McClain*, 252 F.3d 1279, 1287-88 (11th Cir.2001); *United States v. Patrick*, 248 F.3d 11, 27-28 (1st Cir.2001).

These Circuits reason that "use" must be defined in reference to U.S.S.G. § 1B1.3(a), which provides: "[u]nless otherwise specified, ... adjustments in Chapter Three [ ] shall be determined on the basis of ... all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity."

Five Circuits require an affirmative act by the defendant to "use" a minor. *See United States v. Acosta*, 474 F.3d 999, 1002-03 (7th Cir. 2007); *United States v. Pojilenko*, 416 F.3d 243, 247 (3d Cir.2005); *United States v. Suitor*, 253 F.3d 1206, 1210 (10th Cir.2001); *United States v. Parker*, 241 F.3d 1114, 1120-21 (9th Cir.2001); *United States v. Butler*, 207 F.3d 839, 849 (6th Cir.2000). These Circuits read § 3B1.4 and the Application Note more narrowly as limited to the conduct of the defendant and, thus, "otherwise specified." These Courts also note that § 3B1.4 is contained in the "Role in the Offense" section of the Guidelines, which focuses more on the individualized role of the defendant, not on the joint criminal conduct as a whole.

J. Burden of Proof Re: U.S.S.G. § 2D1.8 for "Renting or Managing a Drug Establishment"

In *In re Sealed Case*, 552 F.3d 841 (D.C. Cir. 2009), the defendant pled guilty to maintaining a crack house, in violation of 21 U.S.C. § 856(a)(2). The District Court applied U.S.S.G. § 2D1.8(a)(1), which provides for reference to the controlled substance guideline (§ 2D1.1) with a four level reduction if the defendant only allowed use of the premises, but had no other involvement in the controlled substance offense.

The legal question that divides the Circuits is how to apply § 2D1.8 with respect to the burden of proof. Section 2D1.8 provides:

> (a) Base Offense Level
>
> (1) the offense level from § 2D1.1 applicable to the underlying controlled substance offense, except as provided below.
>
> (2) If the defendant had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be 4 levels less than the offense level from § 2D1.1 applicable to the underlying controlled substance offense, but not greater than level 26.

The Circuits have split on whether § 2D1.8(a)(2) sets the base offense level or is a mitigation provision. *Compare United States v. Dickerson*, 195 F.3d 1183,

1189-90 (10th Cir.1999) (holding burden is on the defendant to show applicability of § 2D1.8(a)(2)) *with United States v. Leasure,* 319 F.3d 1092, 1098 (9th Cir.2003) (holding burden is on the government to show participation under § 2D1.8(a)(1)). If the two provisions are alternative base offense levels, then the Government has the burden of proving participation to get the higher base offense level of (a)(1). If (a)(2) is a mitigation provision, then the defendant has the burden of demonstrating that he did not participate in the drug offense.

The majority in *In re Sealed Case* , not discussing the circuit split but (in my read taking the position that the Government bears the burden of proof of participation) remanded to the District Court for further findings because the PSIR contained no discussion of whether the defendant "participated" in the offense (search of two bedroom apartment turned up crack in roommate's bedroom and defendant admitted he knew it was there and permitted it to be there) and because the District Court made no factual findings on the issue. The dissent would have affirmed under the plain error rule because of the Circuit split.

K. Whether Assistance to State or Local Authorities Can Be a Basis for the Government's Filing of a Motion for Downward Departure

> We have not previously ruled on whether assistance to state or local authorities can be a basis for the government filing a motion under § 3553(e) or § 5K1.1. Other circuits have addressed this issue, however, and the result has been a circuit split. *Compare United States v. Love,* 985 F.2d 732, 734-35 (3d Cir.1993) (concluding that the measure of assistance provided by the defendant should not be limited to assistance provided to federal authorities), *and United States v. Emery,* 34 F.3d 911, 913 (9th Cir.1994) (following *Love*), with *United States v. Kaye,* 140 F.3d 86, 87-88 (2d Cir.1998) (a divided court declined to follow *Love* and concluded that assistance must be provided to federal authorities for purposes of a motion under § 3553(e) or § 5K1.1, but that such assistance may be considered by the district court under U.S.S.G. § 5K2.0).

United States v. Fields, 512 F.3d 1009, 1012 n.2 (8th Cir. 2008) (not deciding issue because Court concluded that Government had no obligation to move for a downward departure).

L. *Safety-Valve - Duty of Government to Interview Defendant After Submission of Written Proffer*

U.S.S.G. § 2D1.1(b)(7) ("safety-valve") allows for a defendant to receive a two-level reduction in offense level if the criteria of that section are met. One of the requirements is that "the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."

> We note there is a circuit split regarding whether, once a defendant submits a written proffer and offers to provide additional information if needed, the government then has a duty to interview the defendant. *Compare United States v. Stephenson*, 452 F.3d 1173, 1182 (10th Cir.2006) ("[T]he onus is on the defendant to come forward with all information he has concerning his relevant conduct."); with *United States v. Brack*, 188 F.3d 748, 763 (7th Cir.1999) (holding a defendant's truthful written statement combined with the defendant's offer to submit to a safety valve interview satisfied the safety valve disclosure requirement, but noting "a defendant cannot satisfy the disclosure requirement simply by notifying the court of his willingness to submit to a safety valve interview"). This conflict does not affect this case, however, because Milkintas did not submit a written proffer to the Government.

United States v. Milkintas, 470 F.3d 1339, n.4 (11th Cir. 2006)

M. *U.S.S.G. § 2L1.2(b)(1)(A)(i) - Enhancement for Prior Conviction for "Drug Trafficking Offense"*

U.S.S.G. § 2L1.2(b)(1)(A)(i) (governing Unlawfully Entering or Remaining in the United States) provides for a sixteen level increase if the defendant was previously deported, or unlawfully remained in the United States, after conviction for "a drug trafficking offense for which the sentence imposed exceeded 13 months." Application Note 1(B)(iv) defines "drug trafficking offense" as a federal, state or local law prohibiting manufacture, import, export, distribution or dispensing "or the possession of a controlled substance with intent to manufacture, import, export, distribute or dispense." Under some state laws, the necessary "intent" to distribute is inferred from the quantity alone.

In *United States v. Madera-Madera*, 333 F.3d 1228, 1231-34 (11th Cir. 2003), the Eleventh Circuit found that a Georgia drug conviction counted as a drug trafficking offense because the statute presumes an intent to distribute with possession of a large quantity of controlled substances.

The Fifth, Sixth, Ninth, Tenth have disagreed. Those Circuits generally reason that the Guideline requires that the state statute have intent to distribute as an element, which is either proven to a jury or pled to by the defendant. *See United States v. Lopez-Salas*, 513 F.3d 174, 177-180 (5th Cir. 2008); *United States v. Villa-Lara*, 451 F.3d 963, 965 (9th Cir. 2006); *United States v. Montanez*, 442 F.3d 485, 493-94 (6th Cir. 2006); *United States v. Herrera-Roldan*, 414 F.3d 1238, 1240-43 (10th Cir. 2005).

See also Recent Development: Criminal Law: United States v. Lopez-Salas: Can a State Statute's Presumption of Intent Create a Drug Trafficking Offense Under the United States Sentencing Guidelines?, 31 Am. J. Trial Advoc. 669 (2008)

N. *When Can an Attorney Appeal from the Trial Court's Criticism of Him/Her?*

While not a criminal issue per se, the following issue could come up in some relevant jurisdictions:

> It is not always easy to determine whether a court's criticism of an attorney should be regarded as a sanction in a collateral proceeding, and there is some disagreement among the courts of appeals as to the circumstances in which an appeal from a court's criticism of an attorney is permitted. The Seventh Circuit permits such appeals only if the court has imposed a formal sanction against the attorney carrying a monetary penalty. See *Seymour v. Hug*, 485 F.3d 926, 929 (7th Cir.2007) ("[A]n attorney can bring an appeal on her own behalf when challenging a district court decision imposing monetary sanctions on the attorney, but this rule does not allow an appeal of otherwise critical comments by the district court when no monetary sanctions have been imposed."). Other courts permit an attorney to appeal from a judicial order in which the court states that the attorney has engaged in professional misconduct, holding that such a declaration is itself an appealable sanction. See *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1168-69 (10th Cir.2003); *United States v. Talao*, 222 F.3d 1133, 1137 (9th

> Cir.2000); *Walker v. City of Mesquite*, 129 F.3d 831, 832-33 (5th Cir.1997); *Sullivan v. Comm. on Admissions & Grievances*, 395 F.2d 954, 956 (D.C.Cir.1967). The First Circuit has adopted a middle position, not requiring a monetary sanction, but finding that "[w]ords alone may suffice if they are expressly identified as a reprimand." *In re Williams*, 156 F.3d 86, 92 (1st Cir.1998); see *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-44 (3d Cir.2007).

Nisus Corp. v. Perma-Chink Systems, Inc., 497 F.3d 1316, 1319-20 (Fed. Cir. 2007). The Federal Circuit concludes that "a court's order that criticizes and attorney and that is intended to be 'a formal judicial action' in a disciplinary proceeding is an appealable decision, but that other kinds of judicial criticism of lawyers' actions are not reviewable." *Id.* at 1320.

See also Note: Scolded: Can an Attorney Appeal a District Court's Order Finding Professional Misconduct?, 77 Fordham L. Rev. 219 (2008); *Comment: Sticks and Stones: The Ability of Attorneys to Appeal from Judicial Criticism*, 157 U. Pa. L. Rev. 1485 (2009).

O. *Whether 18 U.S.C. § 3583(i) (Delayed Revocation of Supervised Release) Contains an Implicit Sworn-Facts Requirement*

Title 18 U.S.C. § 3583(i) provides:

> The power of the court to revoke a term of supervised release for violation of a condition of supervised release . . . . extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration <u>if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.</u>

There is a split in the Circuits whether the emphasized language creates an implied sworn-facts requirement.

In *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004), the Ninth Circuit held that the district court lacked jurisdiction to revoke Vargas-Amaya's supervised release because the warrant issued during the term of supervised release was not based on facts supported by oath or affirmation. Approximately two months before expiration of his supervised release term, Vargas-Amaya's probation officer filed a Petition for warrant, containing allegations not sworn to

under oath. The District Court issued the warrant. Vargas-Amaya was arrested on the warrant two months after his term of supervised release expired. The Court held that the plain meaning of the term "warrant" requires a sworn oath or affirmation of the facts. The Court primarily relied upon the Warrant Clause of the Fourth Amendment: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ."

In *United States v. Garcia-Avalino,* 444 F.3d 444, 445 (5th Cir.2006), the Fifth Circuit rejected the proposition "that there is an implicit sworn-facts requirement embedded in the very meaning of the word 'warrant' as a legal term," and concluded that the district court had jurisdiction over the defendant under § 3583(i) regardless of whether the warrant was supported by sworn facts.

The Eighth Circuit discussed *Vargas-Amaya* in *United States v. Hacker,* 450 F.3d 808, 815-16 (8th Cir. 2006). In *Hacker,* the Court held that any requirement for "sworn-facts" had been met because the warrant was issued after Hacker had been indicted by a federal grand jury on separate charges, which constituted the violation of supervised release. The Court concluded that the requirement of probable cause underlying the grand jury indictment was sufficient to support the warrant.

IV. CIRCUIT SPLITS WHERE THE EIGHTH CIRCUIT HAS TAKEN A POSITION

A. Whether Prosecution's Use of Post-Arrest, Pre-Miranda Silence Violates Fifth Amendment Privilege Against Self-Incrimination

> [T]here is a split among the other federal circuits as to whether a prosecutor's use of a defendant's post-arrest, pre-*Miranda* silence as substantive evidence of guilt violates the *Fifth Amendment* privilege against self-incrimination. The Seventh, Ninth, and D.C. Circuits have all squarely held that it does. *See United States v. Velarde-Gomez,* 269 F.3d 1023, 1028-30 (9th Cir. 2001) (en banc); *United States v. Whitehead,* 200 F.3d 634, 637-39 (9th Cir. 2000); *United States v. Moore,* 322 U.S. App. D.C. 334, 104 F.3d 377, 384-90 (D.C. Cir. 1997); *United States v. Hernandez,* 948 F.2d 316, 322-23 (7th Cir. 1991). The First and Sixth Circuits have gone further and have held that the substantive use of even pre-arrest silence

> can violate the privilege against self-incrimination. *See Combs [v. Coyle]*, 205 F.3d [269,] 280- 83 [(6th Cir. 2000)]; *Coppola v. Powell*, 878 F.2d 1562, 1567-68 (1st Cir. 1989). The Fourth, Eighth, and Eleventh Circuits have, on the other hand, found the substantive use of post-arrest, pre-*Miranda* silence during the prosecution's case-in-chief permissible. *See United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1567-68 (11th Cir. 1991); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985).

United States v. Salinas, 480 F.3d 750, 758-59 (5th Cir. 2007) (applying plain error review and declining to decide question because it is not plain error when the Circuits are split).

Judge Lay, in a concurrence in *United States v. Osuna-Zepada*, 416 F.3d 838, 845-46 (8th Cir. 2005), argued that rehearing *en banc* should be granted to reconsider the Eighth Circuit's position in light of "the clear trend emerging from the circuits on this issue." That call by Judge Lay went unheeded.

See also Damned If You Do, Damned If You Don't?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-Miranda Silence, 19 Geo. Mason. U. Civ. Rts. L.J. 405 (2009); *To Speak or Not to Speak: Can Pre-Miranda Silence Be Used as Substantive Evidence of Guilt?*, 33 Champion 14 (2009)

B. *Reasonableness of Warrantless Search for Weapons: Subjective or Objective Test?*

Under *Terry v. Ohio*, 392 U.S. 1, 24 (1968), and *Michigan v. Long*, 463 U.S. 1032, 1049 (1983), an officer may conduct a protective search for weapons if the officer has a reasonable belief that the suspect is dangerous and that the suspect may gain immediate control of a weapon. The Circuits have split as to whether the "reasonable belief" is assessed subjectively or objectively.

In the Eighth Circuit, an objective test applies. "[S]uch a search is valid if a hypothetical officer in the same circumstances could reasonably believe the suspect is dangerous." *United States v. Rowland*, 341 F.3d 774, 783 (8th Cir. 2003); *United States v. Plummer*, 409 F.3d 906, 909 (8th Cir. 2005). Also applying an objective test is the Seventh Circuit. *See United States v. Brown*, 188 F.3d 860, 866 (7th Cir. 1999).

The First and Ninth Circuits apply a subjective test, and look to whether the officer was actually concerned for his/her safety. *See United States v. Lott*, 870 F.2d 778, 783-84 (1st Cir. 1989); *United States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983).

In *United States v. Wald*, 216 F.3d 1222, 1227 (10th Cir. 2000), the Tenth Circuit recognized, but did not resolve the issue, because the Court found that the officer did not have a subjective belief, nor could there be an objectively reasonable belief under the facts of the case, that the defendant was armed and dangerous.

C. *Whether the Supreme Court's Decision in Lopez-Mendoza Precludes Suppression of Identity Evidence*

In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984), the Supreme Court stated:

> The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.

The Third, Fifth and Sixth Circuits have interpreted that language as never allowing suppression of evidence relating to identity. *See United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir.2006); *United States v. Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir.2005); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir.1999).

The Fourth, Eighth and Tenth Circuits have interpreted the language of *Lopez-Mendoza* as addressing only the question of jurisdiction of the court. In other words, even if the defendant was illegally arrested, the court has jurisdiction to entertain the prosecution. The illegal police activity only affects the admissibility of evidence of identity (such as fingerprints and criminal records obtained as the fruit of the poisonous tree), which may be suppressed if appropriate after application of Fourth Amendment principles. *See United States v. Oscar-Torres*, 507 F.3d 224, 228-29 (4th Cir. 2007); *United States v. Guevara-Martinez*, 262 F.3d 751, 754-55 (8th Cir.2001); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1106 (10th Cir.2006).

D. *Whether Fourth Amendment Violation Occurs During Traffic Stop When Officer Asks Brief Questions Unrelated to the Permissible Reason for the Stop*

This issue arises typically arises when an officer conducts a constitutionally permissible stop, for example based on observation of a traffic violation, but engages in questioning of the driver/passenger for an unrelated purpose (such as asking drug interdiction questions). A constitutionally permissible traffic stop can become unlawful "if it is prolonged beyond the time reasonably required to complete" its purpose. *Illinois v. Caballes,* 543 U.S. 405, 407 (2005).

The Circuits have split on whether a brief extension of a traffic stop by the asking of unrelated questions is permissible. The Tenth, Sixth and Seventh Circuits find a brief extension permissible. *See United States v. Alcaraz-Arellano,* 441 F.3d 1252, 1259 (10th Cir. 2006); *United States v. Burton,* 334 F.3d 514, 518-19 (6th Cir. 2003); *United States v. Childs,* 277 F.3d 947, 951-54 (7th Cir. 2002) (en banc). The Eleventh Circuit has found it impermissible. *See United States v. Pruitt,* 174 F.3d 1215, 1220-21 (11th Cir. 1999).

The Eighth Circuit recognized the issue in *United States v. Peralez,* 526 F.3d 1115, 1121-22 (8th Cir. 2008), but concluded that the questioning was not constitutionally permissible because it was not "brief." In subsequent authority, the Eighth Circuit appears to have held that "brief" unrelated questioning is not unconstitutional. *See United States v. Rivera,* 570 F.3d 1009, 1014 (8th Cir. 2009). The line between "brief" and "unconstitutional" appears to be a fuzzy one.

E. Whether Coercive Terry Stops Require Miranda Warnings

There is currently a split in the Circuits over whether coercive *Terry* stops constitute being in custody for the purposes of *Miranda* warnings.

The Eighth, First, and Fourth Circuits hold that if a *Terry* investigatory stop is reasonable under the Fourth Amendment, then *Miranda* warnings are not required, even if the stop was coercive. *See, United States v. Pelayo-Ruelas,* 345 F.3d 589, 592 (8th Cir.2003); *United States v. Trueber,* 238 F.3d 79, 92 (1st Cir.2001); *United States v. Leshuk,* 65 F.3d 1105, 1110 (4th Cir.1995).

The Second, Seventh, Ninth and Tenth Circuits hold that a whether the *Terry* stop was reasonable under the Fourth Amendment is irrelevant to whether the suspect is in custody for the purposes of *Miranda,* which is concerned with the Fifth Amendment protection against self-incrimination. *See, United States v. Newton,* 369 F.3d 659, 673 (2d Cir.2004); *United States v. Kim,* 292 F.3d 969, 976 (9th Cir.2002); *United States v. Smith,* 3 F.3d 1088, 1097 (7th Cir.1993); *United States v.*

Perdue, 8 F.3d 1455, 1464-65 (10th Cir. 1993). In my view, these are the better reasoned cases.

See also Comment: Drawing a Line Between Terry and Miranda: The Degree and Duration of Restraint, 73 U. Chi. L. Rev. 1075 (2006)

F. *Whether an Unauthorized Driver of a Rental Car has Standing Under the Fourth Amendment to Challenge Vehicle Search*

When someone rents a car from the rental agency, the rental agreement specifies who is an "authorized driver" in the eyes of the rental agency. The Circuits have split on what test should be applied to determine whether an "unauthorized driver," *i.e.*, someone not authorized to drive the rental car by the rental agency, has standing under the Fourth Amendment to challenge a search of the vehicle.

The Fourth, Fifth and Tenth Circuits apply a bright line test: an unauthorized driver of a rental car lacks standing to object to its search. *See United States v. Wellons,* 32 F.3d 117, 119 (4th Cir.1994); *United States v. Boruff,* 909 F.2d 111, 117 (5th Cir.1990); *United States v. Roper,* 918 F.2d 885, 887-88 (10th Cir.1990).

The Eighth and Ninth Circuits have adopted a modified test: an unauthorized driver may have standing to challenge a vehicle search if he received permission from the authorized driver to use the car. *See United States v. Thomas,* 447 F.3d 1191, 1199 (9th Cir.2006); *United States v. Best,* 135 F.3d 1223, 1225 (8th Cir.1998).

The Sixth Circuit uses a totality of the circumstances approach, considering: (1) whether the defendant has a driver's license; (2) the relationship between the unauthorized driver and the lessee; (3) the driver's ability to present rental documents; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company. *See United States v. Smith,* 263 F.3d 571, 586 (6th Cir.2000).

G. *Standard of Review for Denial of Franks Hearing*

Pursuant to *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978), a defendant can challenge the affidavit in support of a search warrant if he/she makes "a substantial preliminary showing" that the affiant deliberately or recklessly included false information or omitted material information in the affidavit and

that the statement or omission was essential to the probable cause finding. The Circuits have split on whether the District Court's denial of a *Franks* hearing is reviewed *de novo*, for clear error or for abuse of discretion.

The Eighth Circuit reviews for abuse of discretion. *See United States v. Fairchild*, 122 F.3d 605, 610 (8th Cir. 1997); *United States v. El-Alamin*, 574 F.3d 915, 924 (8th Cir. 2009).

The Seventh, First, and Second Circuits review for clear error. *See United States v. Skinner*, 972 F.2d 171, 177 (7th Cir. 1992); *United States v. Hadfield*, 918 F.2d 987, 992 (1st Cir. 1990); *United States v. One Parcel of Property*, 897 F.2d 97, 100 (2d Cir. 1990).

The Ninth and Fifth Circuits review *de novo*. *See United States v. Homick*, 964 F.2d 899, 904 (9th Cir. 1992); *United States v. Mueller*, 902 F.2d 336, 341 (5th Cir. 1990).

The Sixth and Eleventh Circuits have noted, but not decided the question, finding that under the particular facts of the case, the more exacting *de novo* standard would be met. *See United States v. Stewart*, 306 F.3d 295, 304 (6th Cir. 2002); *United States v. Arbolaez*, 450 F.3d 1283, 1293 (11th Cir. 2006).

Since most of the Circuits have spoken and since there are three different standards in play, this issue is probably ripe for Supreme Court consideration.

H. Interpretation of Mens Rea Requirement in Drug Manufacturing Statute, 21 U.S.C. § 841(c)(2), Prohibiting Possession or Distribution of Listed Chemical Knowing, or Having Reasonable Cause to Believe, that Chemical Will be Used to Manufacture Controlled Substance

In *United States v. Khattab*, 536 F.3d 765 (7th Cir. 2008), Khattab was convicted of attempting to possess/distribute pseudoephedrine with knowledge, or reasonable cause to believe, that it would be used to manufacture meth. Unfortunately for Khattab, he approached a DEA CI to negotiate the purchase of pseudoephedrine. The CI set him up with a DEA agent posing as a seller with 100 boxes of pills. Khattab was arrested after paying his money and while moving the pills to his car.

The Seventh Circuit noted a split among the circuits as to the proper interpretation of the *mens rea* requirement in 21 U.S.C. § 841(c)(2). The Tenth Circuit holds that the statute requires proof of a defendant's subjective

knowledge that the listed chemical possessed or distributed will be used to manufacture a controlled substance. *See United States v. Truong,* 425 F.3d 1282, 1289 (10th Cir.2005) (requiring government to prove "actual knowledge, or something close to"), *and United States v. Saffo,* 227 F.3d 1260, 1269 (10th Cir.2000) ("The 'reasonable cause to believe' standard thus comports with the subjective 'guilty mind' or 'guilty knowledge' requirement for imposing criminal liability.").

The Eighth, Ninth and Eleventh Circuits interpret the statute to allow conviction upon proof of either subjective knowledge or an objective "cause to believe." *See United States v. Galvan,* 407 F.3d 954, 957 (8th Cir.2005) (rejecting proposed jury instruction that required actual knowledge and ignored "reasonable cause to believe" statutory language); *United States v. Kaur,* 382 F.3d 1155, 1157-58 (9th Cir.2004) ("[C]onsistent with the text of the statute, the instruction incorporates both subjective and objective considerations."); and *United States v. Prather,* 205 F.3d 1265, 1270 (11th Cir.2000) ("[T]he jury thus needed to find either that he knew the pseudoephedrine would be used to manufacture methamphetamine or that he had reasonable cause to believe that it would be.").

In *Khattab,* the Seventh Circuit held that it need not take a position because the evidence was sufficient to prove that Khattab actually knew that the pseudoephedrine would be used to manufacture meth, thus satisfying either standard.

I. Interpreting the "Except" Clause of 18 U.S.C. § 924(c)(1)(A)

Title 18, U.S.C. § 924(c)(1)(A) provides for a consecutive term of imprisonment for use of a firearm during and in relation to a crime of violence or drug trafficking crime. The introductory clause to that section provides for the increased penalties "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law."

In *United States v. Whitley,* 529 F.3d 150 (2d Cir. 2008), the Second Circuit created a split with several other Circuits in interpretation of that clause. In that case, Whitley committed an armed robbery of a deli in the Bronx, accidentally shooting himself in the process. He was convicted of a violation of the Hobbs Act (Count 1), a violation of Section 924(c) (Count 2), and being an Armed Career Criminal (Count 3). Because the firearm was discharged, Whitley was subject to a 10 year minimum sentence on the 924(c) violation. He was subject to a 15 year minimum sentence on the ACCA violation (18 U.S.C. § 924(e)). The District Court sentence Whitley to concurrent 262 month terms on Counts 1 and 3, and a consecutive 120 months on Count 2.

Based on a literal reading of the "except" clause, the Second Circuit held that, since the 15 year sentence on the ACCA violation is a greater than the 10 year minimum sentence under § 924(c), Whitley could not be given a consecutive 10 year sentence under § 924(c). Noting the contrary result reached by other Circuits, the Second Circuit stated:

> Finally, the Government points out that the Fourth, Sixth, and Eighth Circuits have declined to read the "except" clause literally, *see [United States v. Studifin,* 240 F.3d 415, 423 (4th Cir.2001); *United States v. Jolivette,* 257 F.3d 581, 587 (6th Cir. 2001); *United States v. Alaniz,* 235 F.3d 386, 389 (8th Cir. 2000),] as have the Fifth and Sixth Circuits in non-precedential decisions, *see* [*United States v. Collins,* 205 Fed.Appx. 196, 198 (5th Cir. 2006); *United States v. Baldwin,* 41 Fed.Appx. 713, 715 (6th Cir.2002).]
>
> Although we hesitate to precipitate a circuit split, we conclude that there are substantial grounds for doing so with respect to the interpretation of the "except" clause. First, we have repeatedly been instructed to give statutes a literal reading and apply the plain meaning of the words Congress has used. [citations omitted].
>
> . . . .
>
> Second, the case law rejecting a literal reading of the "except" clause was initiated by the Eighth Circuit's reliance in *Alaniz* on the questionable and unexplained argument, which we rejected above, that a literal reading would render *section 924(c)* "grammatically and conceptually incomplete."
>
> . . . .
>
> Read literally, as we believe the "except" clause of subsection 924(c)(1)(A) should be, the clause exempts Whitley from the consecutive ten-year minimum sentence for discharging a firearm because he is subject to the higher fifteen-year minimum sentence provided by section 924(e). The case must therefore be remanded for resentencing.

Whitley, 529 F.3d at 156-58.

See also Squaring the Circle: Reconciling Clear Statutory Text with Contradictory Statutory Purpose in United States v. Whitley, 32 Harv. J. L. & Pub. Pol'y (2009)

J. *Whether the First Amendment Requires Allowance of a "Mistake-of-Age" Defense in Prosecution for Production of Child Pornography*

Title 18, U.S.C., § 2251(a) prohibits the production of child pornography. The Circuits have split on whether a defense of "mistake-of-age" is constitutionally required under the First Amendment so as to not chill the production of legal adult pornography.

The Eighth Circuit, recognizing the conflict in the Circuits, held in *United States v. Wilson*, 565 F.3d 1059, 1067-69 (8th Cir. 2009), that the First Amendment does not require a mistake-of-age defense. Reaching the same conclusion are the Eleventh, Fourth and Fifth Circuits. *See United States v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008); *United States v. Malloy*, 568 F.3d 166, 173 (4th Cir. 2009); *United States v. Crow*, 164 F.3d 229, 236 (5th Cir. 1999).

The Ninth Circuit reached a contrary result in *United States v. United States Dist. Ct.*, 858 F.2d 534, 541 (9th Cir. 1988). Note: the Ninth Circuit requires the defendant to prove the "mistake-of-age" defense by clear and convincing evidence.

K. *Whether Juvenile Adjudications May Constitutionally be Used as Predicate Convictions to Support an ACCA Enhancement*

The Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), imposes a mandatory minimum sentence of fifteen years (greater than the otherwise applicable 10 year statutory maximum) if the defendant has three prior convictions for serious drug offenses or violent felonies. The ACCA provides, in § 924(e)(2)(C), that an "act of juvenile delinquency" can constitute a "violent felony." The Circuits have split on whether a prior juvenile adjudication may constitutionally be used as a predicate conviction under the ACCA.

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), provides that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." The underlying rationale of the prior conviction exception to *Apprendi* is an assumption that prior convictions can

reliably be proven. *See also Almendarez-Torres v. United States*, 523 U.S. 224, 243-44 (1998). Juvenile adjudications, however, do not come with all of the procedural safeguards that adult convictions come with, most notably (in most states) the right to a jury trial.

Four Circuits, including the Eighth Circuit, have held that juvenile adjudications may be deemed qualifying convictions under the ACCA, consistent with *Apprendi*, and therefore need not be submitted to the jury for fact-finding. *See United States v. Smalley*, 294 F.3d 1030, 1031-32 (8th Cir.2002); *United States v. Crowell*, 493 F.3d 744, 479 (6th Cir. 2007); *United States v. Burge*, 407 F.3d 1183, 1190-91 (11th Cir.2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir.2003). These Circuits reason that juvenile adjudications have sufficient guarantees of reliability to pass constitutional muster and that a right to a jury trial is not constitutionally required for a juvenile adjudication. In *Smalley*, the Eighth Circuit reasoned that "the use of a jury in the juvenile context would 'not strengthen greatly, if at all, the fact-finding function,' " *Smalley*, 294 F.3d at 1033 (quotation omitted), and that the safeguards required for juvenile offenses, such as the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and proof of guilt beyond a reasonable doubt-"are more than sufficient to ensure the reliability that Apprendi requires." *Smalley*, 294 F.3d at 1033.

However, the Ninth Circuit reached the opposite conclusion in *United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001). *Tighe* reasoned that juvenile adjudications do not feature the "fundamental triumvirate of procedural protections" that guarantee reliability - "fair notice, reasonable doubt and the right to a jury trial." *Id.* at 1193. *Tighe* held that "Apprendi 's narrow 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt." *Id.* at 1194.

In *United States v. Matthews*, 498 F.3d 25, 33-36 (1st Cir. 2007), the First Circuit discussed the issue, but found that, since Massachusetts law allows for a jury trial in juvenile adjudications (a right that Matthews declined at the time), no constitutional issue was presented. The same result was reached by the Seventh Circuit in *United States v. Wilburn*, 473 F.3d 742, 746 (7th Cir. 2007).

Matthews notes that "[t]hus, while their outcomes differed, all of the courts to consider the issue have agreed that 'the question of whether juvenile adjudications should be exempt from *Apprendi's* general rule should [ ] turn on ... an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption.'" *Matthews*, 498 F.3d at 35 (quoting *Smalley*, 294 F.3d at 1032-33). Thus, even

outside of the question of whether there was any right to a jury trial with respect to the juvenile adjudication, you should carefully examine what procedural protections were used and consider whether a constitutional argument can be raised.

See also Note: What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" With Criminal "Convictions", 49 B.C. L. Rev. 495 (2008); *Case Comment: Criminal Law - First Circuit Upholds Constitutionality of Juvenile Convictions as Predicate Offenses Under the Armed Career Criminal Act - United States v. Matthews*, 41 Suffolk U. L. Rev. 369 (2007); *Note: Never Efficient, But Always Free: How the Juvenile Adjudication Question is the Latest Sign that Almendarez-Torres v. United States Should be Overturned*, 45 Am. Crim. L. Rev. 1167 (2008); *Note: The Use of Juvenile Adjudications Under the Armed Career Criminal Act*, 85 B.U. L. Rev. 263 (2005); *Note: But I Was Just a Kid: Does Using Juvenile Adjudications to Enhance Adult Sentences Rune Afoul of Apprendi v. New Jersey?* 26 Cardozo L. Rev. 837 (2005); and many more too numerous to list

L. *Whether Indictment Under Both the Bank Robbery Act and the Hobbs Act Is Multiplicitous*

The Double Jeopardy Clause of the Fifth Amendment prohibits putting a person in jeopardy twice for the same offense. Issues sometimes arise whether a single transaction can give rise to prosecution for two distinct offenses under two different statutes. The general test is whether each statute "requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

The Federal Bank Robbery Act, 18 U.S.C § 1113, criminalizes various offenses against banks and other financial institutions. The Hobbs Act, 18 U.S.C. § 1951, prohibits robbery, extortion and other acts affecting interstate commerce. The Circuits are split on whether convictions under both Acts for one bank robbery are multiplicious in violation of the Fifth Amendment, thus prohibiting punishment on both.

In *United States v. Maldonado-Rivera*, 922 F.2d 934, 981-983 (2d Cir.1990), the Second Circuit held that the imposition of punishment for convictions under both § 1951 and § 2113 does not violate the Double Jeopardy Clause.

In *United States v. Golay*, 560 F.2d 866 (8th Cir.1977), back when the Eighth Circuit was more defendant friendly, the Eighth held that it is proper to convict under both statutes, but improper to sentence under both.

The Seventh Circuit and the Eleventh Circuit have recently examined the issue, but concluded that they need not decide the question because the existing Circuit split means that there was no plain error. *See United States v. McCarter*, 406 F.3d 460, 464 (7th Cir. 2005); *United States v. Reddick*, 231 Fed. Appx. 903 (11th Cir. 2007) (suggesting that conviction and punishment under both Acts would not violate Double Jeopardy).

M. Burden of Proof on Competency to Stand Trial

The Circuits are split on whether the Government bears the burden of proving that the defendant is competent to stand trial or whether the defendant bears the burden of proving incompetency. Title 18, U.S.C. § 4241, governing motions to determine competency, does not state who bears the burden or proof, providing only that the District Court must determine the issue by a preponderance of the evidence.

The Eighth, Fourth and Eleventh Circuits place the burden on the defendant to prove incompetency. *See United States v. Denton*, 434 F.3d 1104. 1112 (8th Cir. 2006); *United States v. Robinson*, 404 F.3d 850, 856 (4th Cir. 2005); *Battle v. United States*, 419 F.3d 1292, 1298 (11th Cir. 2005). There is also *dicta* in *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996), that "Congress has directed that the accused in a federal prosecution must prove incompetence by a preponderance of the evidence."

The Third, Fifth, and Ninth Circuits hold that the Government has the burden of proving competency. *See United States v. Velasquez*, 885 F.2d 1076, 1089 (3rd Cir. 1989); *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987); *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991). Note that those decisions all predate *Cooper v. Oklahoma.*

The Seventh Circuit has taken both positions. *Compare United States v. Teague*, 956 F.2d 1427, 1431 n.10 (7th Cir. 1992) (Government's burden), *with United States v. Morgano*, 39 F.3d 1358, 1373 (7th Cir. 1994) (defendant's burden). The Second Circuit has ducked the question. *See United States v. Nichols*, 56 F.3d 403, 410 (2nd Cir. 1995). One District Court has adopted the position that the defendant must make a prima *facie* showing of incompetency and then the burden of proof of competency by a preponderance of the evidence shifts to the Government. *See United States v. Brown*, 2007 U.S. Dist. LEXIS 75105 (E.D.N.Y. 2007).

A recent decision collecting all of the cases, including various District Court opinions on both sides of the question, is *United States v. Patel*, 524 F.Supp.2d 107 (D. Mass. 2007) (holding Government bears the burden).

N. *Whether Expert Testimony Regarding Eyewitness Identification is Admissible*

The old rule in many Circuits had been that expert testimony regarding eyewitness identifications is inadmissible. The tide is shifting, with several courts allowing such evidence upon a proper foundational showing.

An excellent recent decision cataloging the caselaw and setting forth the analytical framework (applying *Daubert*) is *United States v. Smith*, 621 F.Supp.2d 1207 (M.D. Ala. 2009) (holding expert's testimony admissible).

The most recent Eighth Circuit decision on the issue is *United States v. Martin*, 391 F.3d 949 (8th Cir. 2004). In *Martin*, the Eighth Circuit affirmed the trial court's exclusion of expert testimony regarding eyewitness testimony because the expert "would not have offered an opinion as to the reliability of either Michael's or Clay's identifications of Martin. The general reliability of eyewitness identification is a matter of common understanding." *Id.* at 954. *See also United States v. Kime*, 99 F.3d 870, 883 (8th Cir. 1996) (upholding exclusion as expert testimony regarding eyewitness testimony does not qualify as "scientific knowledge" under *Daubert*).

Interestingly, and contrary to the rationale of *Martin*, the Court in *Smith* found that the expert's testimony should be limited to the results of empirical research regarding the general reliability of eyewitness identification and that the expert could not testify regarding the identifications by the specific witnesses in the case because specific testimony would invade the province of the jury to assess witness credibility. *See Smith*, 621 F.Supp.2d at 1221.

O. *Admissibility of Plea Discussions Against the Government*

This is an issue that I recently argued at trial. Prior to indictment, my client was subpoenaed to appear before the Grand Jury. The United States wanted her to testify against her boyfriend; specifically that she drove her boyfriend to drug deals and, on one particular occasion, was there to watch the crack. If she testified to the Grand Jury, she would be prosecuted in state court (with a likely sentence of probation) and, if not, would be federally prosecuted. My client declined to testify to the Grand Jury, taking the position that the

requested testimony would be perjury on her part. I wanted to offer evidence of those plea discussions to bolster my client's testimony that she did not know what her boyfriend was up to. *See United States v. Biaggi*, 990 F.2d 662, 689-91 (2d Cir. 1991) (evidence that defendant had rejected offer of immunity from government for testimony against others is relevant and admissible to show defendant's "consciousness of innocence"); *United States v. Maaloof*, 205 F.3d 819, 824-25 (5th Cir. 2000) (same).

Rule of Evidence 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements) by its express terms applies only to evidence offered "against the defendant." It does not prohibit a defendant from offering such evidence against the Government. The Government argued that plea discussions are inadmissible under Rule of Evidence 408 (compromise and offers to compromise), citing *United States v. Verdoorn*, 528 F.2d 103 (8th Cir. 1976). Two Circuits have concluded that Rule 408 has no application to a criminal case because Rule 410 covers the subject. *See United States v. Baker*, 926 F.2d 179, 180 (2d Cir. 1991); *United States v. Graham*, 91 F.3d 213, 218-19 (D.C. Cir. 1996).

Interestingly, there is no mention of Rule of Evidence 410 in the *Verdoorn* opinion. That is because Rule 410 did not take effect until August 1, 1975, *see* Pub.L. 93-595, 88 Stat. 1933 at Rule 410, and was not applicable at the time of Verdoorn's trial in July of 1975. Rule 408 was also enacted as part of Public Law 93-595, but had an earlier effective date of July 1, 1975, 180 days after enactment of that Public Law on January 2, 1975. Thus, Verdoorn's trial took place in the one month period after Rule 408 took effect and before Rule 410 took effect. Thus, I argued that *Verdoorn's* reliance on Rule 408 is no longer good law as there is presently a more specific rule, Rule 410, which governs the admissibility of plea discussions. As Rules 408 and 410 are part of the closely related statutory enactments, albeit with slightly different effective dates, the proper construction should be that Rule 408 applies to offers to compromise in civil cases and Rule 410 applies to plea discussions in criminal cases.

Judge Reade granted the Government's Motion in Limine on this issue, without any specific rationale given. The Government also argued that the evidence should be excluded under Rule 403, that it would be hearsay and that a "dangerous waiver" of attorney-client privilege could occur. The trial resulted in a hung jury, after which we reached a very favorable plea agreement, so the issue will not be appealed.

P. U.S.S.G. § 2D1.1, Note 12 Exclusionary Provision Regarding Drugs the Defendant Did Not Intend to Provide - Who Bears the Burden of Persuasion?

Note 12 to U.S.S.G. § 2D1.1, states:

> In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. . . . <u>If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.</u> (emphasis added).

Most of the Circuits have held, based on the language "if the defendant establishes," that the defendant bears the burden of persuasion as to exclusion of quantities that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing. *See United States v. Davis*, 478 F.3d 266 (5th Cir. 2007); *United States v. Barnes*, 244 F.3d 172, 177 & n. 6 (1st Cir.2001); *United States v. Munoz*, 233 F.3d 410, 415 (6th Cir.2000); *United States v. Wash*, 231 F.3d 366, 373 (7th Cir.2000); *United States v. Maldonado*, No. 99-3334, 2000 WL 825717 at *3 (10th Cir. June 26, 2000); *Brown v. United States*, 169 F.3d 531, 534-35 (8th Cir.1999); *United States v. Lopes-Montes*, 165 F.3d 730, 731 (9th Cir.1999). These Circuits largely rely on the language of note 12 explicitly stating if "the defendant establishes."

The Second Circuit, however, has concluded that the defendant bears only the burden of production and the burden of persuasion (to include the drugs) rests with the Government. *See United States v. Hazut*, 140 F.3d 187, 192 (2d Cir.1998).

The majority rule is likely the correct one.

Q. "Multi-Factor" Approach to Determination of Prior Conviction's "Similarity" to Offense in Criminal History Statute

U.S.S.G. § 4A1.2(c)(1) identifies several offenses that do not score any criminal history points unless a sentence of probation of more than one year or a term of imprisonment of at least thirty days was imposed. U.S.S.G. § 4A1.2(c)(1) applies to "offenses similar to" the listed offenses.

In *United States v. Borer*, 412 F.3d 987, 992 (8th Cir. 2005), the Eighth Circuit discussed the two tests which have developed in the Circuits for determining whether an offense is "similar" to the listed offenses. The Eighth Circuit continued to apply its "elements" or "essential characteristics" approach in which the sentencing court compares the "resemblance and character" of the offenses. The Third and Fourth Circuits also follow this approach.

The other approach is the "multi-factor" approach articulated by the Fifth Circuit in *United States v. Hardeman*, 933 F.2d 278, 291 (5th Cir. 1991), and followed by the Second and Seventh Circuits.

In his concurring opinion in *United States v. Leon-Alvarez*, 532 F.3d 815, 820-21 (8th Cir. 2008), Judge Bright noted that the Sentencing Commission had resolved this split in Amendment 709 (effective November 1, 2007), and adopted the multi-factor approach. Judge Bright also concluded that Amendment 709 was a "clarifying amendment" "[a]nd as such, Amendment 709 may be given retroactive effect at sentencing and override contrary circuit precedent." *Id.* at 821.

R. *Application of Updated "Advisory" Sentencing Guidelines as Ex Post Facto Violation*

Booker renders the Sentencing Guidelines advisory, rather than mandatory. The Circuits have split on whether use of the Guidelines Manual in effect at the date of sentencing yielding a sentence higher than the Manual in effect at the date of the commission of the offense violates the *Ex Post Facto* Clause. The Sentencing Commission has not amended U.S.S.G. § 1B1.11 regarding which Guidelines Manual to use in light of *Booker* rendering the Guidelines advisory.

The Eighth and D.C. Circuits have held that a violation of the *Ex Post Facto* clause would occur under those circumstances. *See United States v. Carter*, 490 F.3d 641, 643 (8th Cir.2007); *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008).

Several other circuits appear to regard the *ex post facto* analysis as unchanged post-*Booker*. *See United States v. Gilman,* 478 F.3d 440, 449 (1st Cir.2007) (stating that, given *post-Booker* circuit precedent, it was "doubtful" that the First Circuit would conclude that *Booker* had the effect of eliminating *ex post facto* concerns relevant to retroactive application of the Guidelines); *United States v. Wood,* 486 F.3d 781, 791 (3d Cir.2007); *United States v. Austin,* 479 F.3d 363, 367 (5th Cir.2007); *United States v. Stevens,* 462 F.3d 1169, 1170 (9th Cir.2006).

The Seventh Circuit, however, has concluded that use of a later Manual no longer presents an *ex post* facto problem, stating that "the ex post facto clause should apply only to laws and regulations that bind rather than advise." *United States v. Demaree,* 459 F.3d 791, 795 (7th Cir. 2006). *See also United States v. Nurek,* 578 F.3d 618, 625 (7th Cir. 2009).

The Eleventh and Sixth Circuits and at least one judge of the Fifth Circuit have agreed. *See United States v. Mathis,* 239 Fed.Appx. 513, 517 n. 2 (11th Cir.2007); *United States v. Barton,* 455 F.3d 649, 655 n. 4 (6th Cir.2006); *see also United States v. Rodarte-Vasquez,* 488 F.3d 316, 325 (5th Cir.2007) (Jones, C.J., concurring).

The Second Circuit has acknowledged the issue, but left it open. *See United States v. Johnson,* 558 F.3d 193, 195 n.1 (2d Cir. 2009)

S. Calculating Gain for Insider Trading: U.S.S.G. § 2B1.4

U.S.S.G. § 2B1.4 (formerly 2F1.2 before 2001 amendments) provides for increases in offense levels based upon "the gain resulting from the offense." The commentary provides that "Because the victims and their losses are difficult if not impossible to identify, the gain, i.e. the total increase in value realized through trading in securities by the defendant . . . is employed instead of the victims' losses."

In *United States v. Mooney,* 425 F.3d 1093 (8th Cir. 2005) (en banc), the Eighth Circuit held that the "gain" attributable to insider trading is the difference between the price received by the insider upon sale of the stock less the insider's cost for the stock.

In *United States v. Nacchio,* 573 F.3d 1062 (10th Cir. 2009), the Tenth Circuit agreed with Judge Bright's dissent in *Mooney.* The Tenth Circuit held that the Eighth Circuit's approach ignores the ups and downs of a stock's price attributable to market factors and does not result in a realistic calculation of gain. Accordingly, the Tenth Circuit concluded that the sentencing court must

calculate the "gain" for purposes of sentencing with reference to the amount that the defendant benefited as a result of using insider information.

T. *Can a Sentencing Court Impose a Sentence Consecutive to a Future Sentence Not Yet Imposed?*

The Circuits are fairly evenly split on the question of whether a federal sentencing court can impose a sentence consecutive to a sentence not yet imposed.

Three Circuits hold that the District Court does not have that authority. *See Romandine v. United States*, 206 F.3d 731 (7th Cir.2000); *United States v. Quintero*, 157 F.3d 1038 (6th Cir.1998); *United States v. Smith*, 472 F.3d 222 (4th Cir.2006).

Four Circuits hold that the District Court does have that authority. *See United States v. Hernandez*, 234 F.3d 252 (5th Cir.2000); *United States v. Williams*, 46 F.3d 57 (10th Cir.1995); *Salley v. United States*, 786 F.2d 546 (2d Cir.1986); *United States v. Ballard*, 6 F.3d 1502 (11th Cir.1993).

The Eighth Circuit has also held that a District Court has the authority to impose a sentence consecutive to a state sentence not yet imposed. *See United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001). However, in *United States v. Lowe*, 312 Fed. Appx. 836 (8th Cir. 2009), the defendant argued that the Eighth Circuit should revisit *Mayotte* in light of the Circuit split. In response, the Government conceded that it now agrees that a district court does not have authority to impose a federal sentence consecutive to a state court sentence to be imposed in the future, but that the state courts and the Federal Bureau of Prisons can reach their own agreement on how the sentences should run irrespective of what decision the federal judge makes. The Eighth Circuit ultimately affirmed the District Court's imposition of the federal sentence consecutive to the yet to be imposed state sentence, following *Mayotte*.

U. *Whether a District Court Can Enter a Restitution Order More than 90 Days After Sentencing*

Title 18, U.S.C., § 3664(d)(5) provides that "[i]f the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, *not to exceed 90 days after sentencing*." (emphasis added).

Several Circuits, based on a plain language interpretation of § 3664(d)(5), hold that a district court lacks authority to enter a restitution order more than 90 days after sentencing. *See United States v. Maung,* 267 F.3d 1113, 1120-21 (11th Cir. 2001); *United States v. Jolivette,* 257 F.3d 581, 584 (6th Cir. 2001); *United States v. Farr,* 419 F.3d 621, 624 (7th Cir. 2005).

Other Circuits have concluded that the 90 day requirement is subject to equitable tolling if the delay is attributable to the defendant. *See United States v. Dando,* 287 F.3d 1007, 1011 n.5 (10th Cir. 2002); *United States v. Terlingo,* 327 F.3d 216, 220, 222 (3d Cir. 2003).

Still other Circuits apply a harmless error analysis. *See United States v. Cienfuegos,* 462 F.3d 1160, 1163 (9th Cir. 2006); *United States v. Zakhary,* 357 F.3d 186, 191 (2d Cir. 2004).

Recently, in *United States v. Balentine,* 569 F.3d 801 (8th Cir. 2009), the Eighth Circuit took what can only be described as a creative approach. The Eighth Circuit first agreed that the plain language of § 3664(d)(5) "unambiguously imposes a 90-day time limit on restitution orders." *Id.* at 805. However, because the intended beneficiaries of the 90-day rule are the victims (to help prevent dissipation of the defendant's assets), not the victimizer defendant, the Court found that a defendant who cannot show any prejudice has no remedy for violation of the 90-day rule. *Id.* at 806-07. The Court left open the possibility that a defendant could show actual prejudice. *Id.* at 807.

V. Determining Whether a Felon's Right to Possess Firearms upon Release from Parole or Imprisonment has been Restored

The Armed Career Criminal Act, in 18 U.S.C. § 921(a)(20), provides in part that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or <u>has had civil rights restored</u> shall not be considered a conviction for purposes of this chapter, <u>unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.</u>"

The Circuits have split on the question of whether the court may look only to a certificate of restoration of civil rights to determine whether the certificate expressly limits a felon's rights to possess firearms or whether the court may look to the whole of state law to make that determination. This issue is significant because a certificate of restoration may generally restore civil rights without specifically discussing whether the right to possess firearms has been

restored while a state statute may prohibit the possession of firearms even if civil rights are restored.

The Fifth, Seventh, Ninth, Eleventh and D.C. Circuits hold that the court may look only to the certificate of restoration. *See United States v. Chenowith*, 459 F.3d 635 (5th Cir. 2006); *United States v. Glaser*, 14 F.3d 1213, 1218 (7th Cir. 1994); *United States v. Herron*, 45 F.3d 340, 343 (9th Cir. 1995); *United States v. Fowler*, 198 F.3d 808 (11th Cir. 1999); *United States v. Bost*, 87 F.3d 1333 (D.C. Cir. 1996).

See also Buchmeier v. United States, 581 F.3d 561 (7th Cir. 2009) (en banc) (extensively discussing issue). In *Buchmeier*, the Government asked the Seventh Circuit to overrule its prior position. The Seventh Circuit declined to do so based on principles of *stare decisis* and suggested that the Supreme Court or Congress take up the question. The time for filing a cert petition has not yet run.

The Fourth, Sixth, Eighth and Tenth Circuits hold that the court may look to the whole of state law. *See United States v. Collins*, 321 F.3d 691 (8th Cir. 2003); *United States v. Baker*, 508 F.3d 1321, 1328-29 (10th Cir. 2007); *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990); *United States v. McLean*, 904 F.2d 216, 218 (4th Cir. 1990).

See also Note: The Firearms Owners' Protection Act and the Restoration of Felons' Right to Possess Firearms: Congressional Intent Versus Notice, 2008 U. Ill. L. Rev. 1045.

MONTEJO
CASE

PRESENTED BY

B. JOHN BURNS
ASSISTANT
FEDERAL PUBLIC DEFENDER

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MONTEJO *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 07–1529. Argued January 13, 2009—Decided May 26, 2009

At a preliminary hearing required by Louisiana law, petitioner Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under *Miranda* v. *Arizona*, 384 U. S. 436, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim's widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. Affirming, the State Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan* v. *Jackson*, 475 U. S. 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The court reasoned that *Jackson*'s prophylactic protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

Held:

1. *Michigan* v. *Jackson* should be and now is overruled. Pp. 3–18.

(a) The State Supreme Court's interpretation of *Jackson* would lead to practical problems. Requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption, as the court below did, might work in States that require an indigent defendant formally to request counsel before an appointment is made, but not in more than half the States, which appoint counsel without request from the defendant. Pp. 3–6.

(b) On the other hand, Montejo's solution is untenable as a theoretical and doctrinal matter. Eliminating the invocation requirement

entirely would depart fundamentally from the rationale of *Jackson,* whose presumption was created by analogy to a similar prophylactic rule established in *Edwards* v. *Arizona,* 451 U. S. 477, to protect the Fifth Amendment-based *Miranda* right. Both *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about the right to counsel once they have invoked it, but a defendant who never asked for counsel has not yet made up his mind in the first instance. Pp. 6–13.

(c) *Stare decisis* does not require the Court to expand significantly the holding of a prior decision in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved "unworkable" is a traditional ground for overruling it. *Payne* v. *Tennessee,* 501 U. S. 808, 827. Beyond workability, the relevant factors include the precedent's antiquity, the reliance interests at stake, and whether the decision was well reasoned. *Pearson* v. *Callahan,* 555 U. S. ___, ___. The first two cut in favor of jettisoning *Jackson:* the opinion is only two decades old, and eliminating it would not upset expectations, since any criminal defendant learned enough to order his affairs based on *Jackson*'s rule would also be perfectly capable of interacting with the police on his own. As for the strength of *Jackson*'s reasoning, when this Court creates a prophylactic rule to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. *Jackson*'s marginal benefits are dwarfed by its substantial costs. Even without *Jackson,* few badgering-induced waivers, if any, would be admitted at trial because the Court has taken substantial other, overlapping measures to exclude them. Under *Miranda,* any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. 384 U. S., at 474. Under *Edwards,* once such a defendant "has invoked his *[Miranda]* right," interrogation must stop. 451 U. S., at 484. And under *Minnick* v. *Mississippi,* 498 U. S. 146, no subsequent interrogation may take place until counsel is present. *Id.,* at 153. These three layers of prophylaxis are sufficient. On the other side of the equation, the principal cost of applying *Jackson*'s rule is that crimes can go unsolved and criminals unpunished when uncoerced confessions are excluded and when officers are deterred from even trying to obtain confessions. The Court concludes that the *Jackson* rule does not "pay its way," *United States* v. *Leon,* 468 U. S. 897, 907–908, n. 6, and thus the case should be overruled. Pp. 13–18.

2. Montejo should nonetheless be given an opportunity to contend that his letter of apology should have been suppressed under the *Edwards* rule. He understandably did not pursue an *Edwards* objection, because *Jackson* offered broader protections, but the decision here changes the legal landscape. Pp. 18–19.

06–1807 (La.), 974 So. 2d 1238, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, and in which BREYER, J., joined, except for n. 5. BREYER, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

No. 07–1529

JESSE JAY MONTEJO, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[May 26, 2009]

JUSTICE SCALIA delivered the opinion of the Court.

We consider in this case the scope and continued viability of the rule announced by this Court in *Michigan* v. *Jackson*, 475 U. S. 625 (1986), forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding.

I

Petitioner Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his own home one day earlier. Suspicion quickly focused on Jerry Moore, a disgruntled former employee of Ferrari's dry cleaning business. Police sought to question Montejo, who was a known associate of Moore.

Montejo waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and was interrogated at the sheriff's office by police detectives through the late afternoon and evening of September 6 and the early morning of September 7. During the interrogation, Montejo repeatedly changed his account of the crime, at first claiming that he

had only driven Moore to the victim's home, and ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. These police interrogations were videotaped.

On September 10, Montejo was brought before a judge for what is known in Louisiana as a "72-hour hearing"—a preliminary hearing required under state law.[1] Although the proceedings were not transcribed, the minute record indicates what transpired: "The defendant being charged with First Degree Murder, Court ordered N[o] Bond set in this matter. Further, Court ordered the Office of Indigent Defender be appointed to represent the defendant." App. to Pet. for Cert. 63a.

Later that same day, two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon (which Montejo had earlier indicated he had thrown into a lake). After some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim's widow. Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence.

At trial, the letter of apology was admitted over defense objection. The jury convicted Montejo of first-degree murder, and he was sentenced to death.

The Louisiana Supreme Court affirmed the conviction and sentence. 06–1807 (1/16/08), 974 So. 2d 1238 (2008). As relevant here, the court rejected Montejo's argument that under the rule of *Jackson*, *supra*, the letter should

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[1] "The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel." La. Code Crim. Proc. Ann., Art. 230.1(A) (West Supp. 2009).

have been suppressed. 974 So. 2d, at 1261. *Jackson* held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U. S., at 636.

Citing a decision of the United States Court of Appeals for the Fifth Circuit, *Montoya* v. *Collins*, 955 F. 2d 279 (1992), the Louisiana Supreme Court reasoned that the prophylactic protection of *Jackson* is not triggered unless and until the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel. 974 So. 2d, at 1260–1261, and n. 68. Because Montejo simply stood mute at his 72-hour hearing while the judge ordered the appointment of counsel, he had made no such request or assertion. So the proper inquiry, the court ruled, was only whether he had knowingly, intelligently, and voluntarily waived his right to have counsel present during the interaction with the police. *Id.*, at 1261. And because Montejo had been read his *Miranda* rights and agreed to waive them, the Court answered that question in the affirmative, 974 So. 2d, at 1262, and upheld the conviction.

We granted certiorari. 554 U. S. ___ (2008).

II

Montejo and his *amici* raise a number of pragmatic objections to the Louisiana Supreme Court's interpretation of *Jackson*. We agree that the approach taken below would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States. Neither would be acceptable.

Under the rule adopted by the Louisiana Supreme Court, a criminal defendant must request counsel, or otherwise "assert" his Sixth Amendment right at the preliminary hearing, before the *Jackson* protections are

triggered. If he does so, the police may not initiate further interrogation in the absence of counsel. But if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.

This rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it. That is how the system works in Michigan, for example, Mich. Ct. Rule 6.005(A) (2009), whose scheme produced the factual background for this Court's decision in *Michigan* v. *Jackson*. Jackson, like all other represented indigent defendants in the State, had requested counsel in accordance with the applicable state law.

But many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency, *e.g.*, Kan. Stat. Ann. §22–4503(c) (2007); and in a number of others, appointment can be made either upon the defendant's request or *sua sponte* by the court, *e.g.*, Del. Code Ann., Tit. 29, §4602(a) (2003). See App. to Brief for National Legal Aid & Defender Assn. et al. as *Amici Curiae* 1a–21a. Nothing in our *Jackson* opinion indicates whether we were then aware that not all States require that a defendant affirmatively request counsel before one is appointed; and of course we had no occasion there to decide how the rule we announced would apply to these other States.

The Louisiana Supreme Court's answer to that unresolved question is troublesome. The central distinction it draws—between defendants who "assert" their right to counsel and those who do not—is exceedingly hazy when applied to States that appoint counsel absent request from the defendant. How to categorize a defendant who merely

asks, prior to appointment, whether he will be appointed counsel? Or who inquires, after the fact, whether he has been? What treatment for one who thanks the court after the appointment is made? And if the court asks a defendant whether he would object to appointment, will a quick shake of his head count as an assertion of his right?

To the extent that the Louisiana Supreme Court's rule also permits a defendant to trigger *Jackson* through the "acceptance" of counsel, that notion is even more mysterious: How does one affirmatively accept counsel appointed by court order? An indigent defendant has no right to choose his counsel, *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 151 (2006), so it is hard to imagine what his "acceptance" would look like, beyond the passive silence that Montejo exhibited.

In practice, judicial application of the Louisiana rule in States that do not require a defendant to make a request for counsel could take either of two paths. Courts might ask on a case-by-case basis whether a defendant has somehow invoked his right to counsel, looking to his conduct at the preliminary hearing—his statements and gestures—and the totality of the circumstances. Or, courts might simply determine as a categorical matter that defendants in these States—over half of those in the Union—simply have no opportunity to assert their right to counsel at the hearing and are therefore out of luck.

Neither approach is desirable. The former would be particularly impractical in light of the fact that, as *amici* describe, preliminary hearings are often rushed, and are frequently not recorded or transcribed. Brief for National Legal Aid & Defender Assn. et al. 25–30. The sheer volume of indigent defendants, see *id.*, at 29, would render the monitoring of each particular defendant's reaction to the appointment of counsel almost impossible. And sometimes the defendant is not even present. *E.g.*, La. Code Crim. Proc. Ann., Art. 230.1(A) (West Supp. 2009) (allow-

ing court to appoint counsel if defendant is "unable to appear"). Police who did not attend the hearing would have no way to know whether they could approach a particular defendant; and for a court to adjudicate that question *ex post* would be a fact-intensive and burdensome task, even if monitoring were possible and transcription available. Because "clarity of . . . command" and "certainty of . . . application" are crucial in rules that govern law enforcement, *Minnick* v. *Mississippi*, 498 U. S. 146, 151 (1990), this would be an unfortunate way to proceed. See also *Moran* v. *Burbine*, 475 U. S. 412, 425–426 (1986).

The second possible course fares no better, for it would achieve clarity and certainty only at the expense of introducing arbitrary distinctions: Defendants in States that automatically appoint counsel would have no opportunity to invoke their rights and trigger *Jackson*, while those in other States, effectively instructed by the court to request counsel, would be lucky winners. That sort of hollow formalism is out of place in a doctrine that purports to serve as a practical safeguard for defendants' rights.

III

But if the Louisiana Supreme Court's application of *Jackson* is unsound as a practical matter, then Montejo's solution is untenable as a theoretical and doctrinal matter. Under his approach, once a defendant is *represented* by counsel, police may not initiate any further interrogation. Such a rule would be entirely untethered from the original rationale of *Jackson*.

A

It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. *United*

States v. *Wade*, 388 U. S. 218, 227–228 (1967); *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932). Interrogation by the State is such a stage. *Massiah* v. *United States*, 377 U. S. 201, 204–205 (1964); see also *United States* v. *Henry*, 447 U. S. 264, 274 (1980).

Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. *Patterson* v. *Illinois*, 487 U. S. 285, 292, n. 4 (1988); *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. *Michigan* v. *Harvey*, 494 U. S. 344, 352–353 (1990). And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment:

> "As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Patterson*, *supra*, at 296.

The *only* question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances. 475 U. S., at 630, 633. We created such a presumption in *Jackson* by analogy to a similar prophylactic rule established to protect the Fifth Amendment based *Miranda* right to have counsel present at any custodial interrogation. *Edwards* v. *Arizona*, 451 U. S. 477 (1981),

decided that once "an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available," unless he initiates the contact. *Id.*, at 484–485.

The *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Harvey*, *supra*, at 350. It does this by presuming his postassertion statements to be involuntary, "even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards." *McNeil* v. *Wisconsin*, 501 U. S. 171, 177 (1991). This prophylactic rule thus "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence." *Texas* v. *Cobb*, 532 U. S. 162, 175 (2001) (KENNEDY, J., concurring).

Jackson represented a "wholesale importation of the *Edwards* rule into the Sixth Amendment." *Cobb*, *supra*, at 175. The *Jackson* Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," 475 U. S., at 633, despite doubt that defendants "actually inten[d] their request for counsel to encompass representation during any further questioning," *id.*, at 632–633, because doubts must be "resolved in favor of protecting the constitutional claim," *id.*, at 633. Citing *Edwards*, the Court held that any subsequent waiver would thus be "insufficient to justify police-initiated interrogation." 475 U. S., at 635. In other words, we presume such waivers involuntary "based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily" in subsequent interactions with police. *Harvey*, *supra*, at 350.

The dissent presents us with a revisionist view of *Jackson*. The defendants' *request* for counsel, it contends, was important only because it proved that counsel *had been*

appointed. Such a non sequitur (nowhere alluded to in the case) hardly needs rebuttal. Proceeding from this fanciful premise, the dissent claims that the decision actually established "a rule designed to safeguard a defendant's right to rely on the assistance of counsel," *post*, at 6–7 (opinion of STEVENS, J.), not one "designed to prevent police badgering," *post*, at 7. To safeguard the right to assistance of counsel from *what*? From a knowing and voluntary waiver by the defendant himself? Unless the dissent seeks to prevent a defendant altogether from waiving his Sixth Amendment rights, *i.e.*, to "imprison a man in his privileges and call it the Constitution," *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942)—a view with zero support in reason, history or case law—the answer must be: from police pressure, *i.e.*, badgering. The antibadgering rationale is the only way to make sense of *Jackson*'s repeated citations of *Edwards*, and the only way to reconcile the opinion with our waiver jurisprudence.[2]

B

With this understanding of what *Jackson* stands for and whence it came, it should be clear that Montejo's interpretation of that decision—that no *represented* defendant can ever be approached by the State and asked to consent to interrogation—is off the mark. When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption

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[2] The dissent responds that *Jackson* also ensures that the defendant's counsel receives notice of any interrogation, *post*, at 6, n. 2. But notice to what end? Surely not in order to protect some constitutional right to receive counsel's advice regarding waiver of the right to have counsel present. Contrary to the dissent's intimations, neither the advice nor the presence of counsel is needed in order to effectuate a knowing waiver of the Sixth Amendment right. Our cases make clear that the *Miranda* waivers typically suffice; indeed, even an *unrepresented* defendant can waive his right to counsel. See *supra*, at 7.

that any subsequent waiver of the right to counsel will be involuntary. There is no "*initial* election" to exercise the right, *Patterson*, 487 U. S., at 291, that must be preserved through a prophylactic rule against later waivers. No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

The dissent's argument to the contrary rests on a flawed *a fortiori:* "If a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer." *Post*, at 3. The question in *Jackson*, however, was not whether respondents were entitled to counsel (they unquestionably were), but "whether respondents validly waived their right to counsel," 475 U. S., at 630; and even if it is reasonable to presume from a defendant's *request* for counsel that any subsequent waiver of the right was coerced, no such presumption can seriously be entertained when a lawyer was merely "secured" on the defendant's behalf, by the State itself, as a matter of course. Of course, reading the dissent's analysis, one would have no idea that Montejo executed any waiver at all.

In practice, Montejo's rule would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches, at least in those States that appoint counsel promptly without request from the defendant. As the dissent in *Jackson* pointed out, with no expressed disagreement from the majority, the opinion "most assuredly

[did] *not* hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant." 475 U. S., at 640 (opinion of Rehnquist, J.). That would have constituted a "shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society." *Ibid.*

Montejo's rule appears to have its theoretical roots in codes of legal ethics, not the Sixth Amendment. The American Bar Association's Model Rules of Professional Conduct (which nearly all States have adopted into law in whole or in part) mandate that "a lawyer shall not communicate about the subject of [a] representation with a party 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." Model Rule 4.2 (2008). But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers. Montejo's proposed rule is both broader and narrower than the Model Rule. Broader, because Montejo would apply it to all agents of the State, including the detectives who interrogated him, while the ethical rule governs only lawyers. And narrower, because he agrees that if a defendant initiates contact with the police, they may talk freely—whereas a lawyer could be sanctioned for interviewing a represented party even if that party "initiates" the communication and consents to the interview. Model Rule 4.2, Comment 3.

Montejo contends that our decisions support his interpretation of the *Jackson* rule. We think not. Many of the cases he cites concern the substantive scope of the Sixth Amendment—*e.g.*, whether a particular interaction with the State constitutes a "critical" stage at which counsel is entitled to be present—*not* the validity of a Sixth Amend-

ment waiver. See *Maine* v. *Moulton*, 474 U. S. 159 (1985); *Henry*, 447 U. S. 264; *Massiah*, 377 U. S. 201; see also *Moran*, 475 U. S. 412. Since everyone agrees that absent a valid waiver, Montejo was entitled to a lawyer during the interrogation, those cases do not advance his argument.

Montejo also points to descriptions of the *Jackson* holding in two later cases. In one, we noted that "analysis of the waiver issue changes" once a defendant "obtains or even requests counsel." *Harvey*, 494 U. S., at 352. But elsewhere in the same opinion, we explained that *Jackson* applies "after a defendant requests assistance of counsel," 494 U. S., at 349; "when a suspect charged with a crime requests counsel outside the context of interrogation," *id.*, at 350; and to "suspects who assert their right to counsel," *ibid.* The accuracy of the "obtains" language is thus questionable. Anyway, since *Harvey* held that evidence obtained in violation of the *Jackson* rule *could* be admitted to impeach the defendant's trial testimony, 494 U. S., at 346, the Court's varying descriptions of when the rule was violated were dicta. The dictum from the other decision, *Patterson, supra,* at 290, n. 3, is no more probative.[3]

The upshot is that even on *Jackson*'s own terms, it

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[3] In the cited passage, the Court noted that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of attorney-client relationship takes effect." *Patterson*, 487 U. S., at 290, n. 3. To support that proposition, the Court cited *Maine* v. *Moulton*, 474 U. S. 159 (1985), which was not a case about waiver. The passage went on to observe that "the analysis changes markedly once an accused even *requests* the assistance of counsel," 487 U. S., at 290, n. 3 (emphasis in original), this time citing *Jackson*. Montejo infers from the "even *requests*" that having counsel is *more* conclusive of the invalidity of uncounseled waiver than the mere requesting of counsel. But the *Patterson* footnote did not suggest that the analysis "changes" in both these scenarios (having a lawyer, versus requesting one) with specific reference to the validity of waivers under the Sixth Amendment. The citation of *Moulton* (a nonwaiver case) for the first scenario suggests just the opposite.

would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.

IV

So on the one hand, requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption is consistent with the theory of that decision, but (as Montejo and his *amici* argue, see Part II, *supra*) would be unworkable in more than half the States of the Union. On the other hand, eliminating the invocation requirement would render the rule easy to apply but depart fundamentally from the *Jackson* rationale.

We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved "unworkable" is a traditional ground for overruling it. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Accordingly, we called for supplemental briefing addressed to the question whether *Michigan* v. *Jackson* should be overruled.

Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. *Pearson* v. *Callahan*, 555 U. S. ___, ___ (2009) (slip op., at 8). The first two cut in favor of abandoning *Jackson:* the opinion is only two decades old, and eliminating it would not upset expectations. Any criminal defendant learned enough to order his affairs based on the rule announced in *Jackson* would also be perfectly capable of interacting with the police on his own. Of course it is likely true that police and prosecutors have been trained to comply with *Jackson*, see generally Supplemental Brief

for Larry D. Thompson et al. as *Amici Curiae*, but that is hardly a basis for retaining it as a constitutional requirement. If a State *wishes* to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so.[4]

Which brings us to the strength of *Jackson*'s reasoning. When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. "The value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost." *Minnick*, 498 U. S., at 161 (SCALIA, J., dissenting). We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran, supra,* at 426).

What does the *Jackson* rule actually achieve by way of preventing unconstitutional conduct? Recall that the purpose of the rule is to preclude the State from badgering defendants into waiving their previously asserted rights. See *Harvey, supra,* at 350; see also *McNeil*, 501 U. S., at 177. The effect of this badgering might be to coerce a waiver, which would render the subsequent interrogation a violation of the Sixth Amendment. See *Massiah, supra,* at 204. Even though involuntary waivers are invalid even

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[4] The dissent posits a different reliance interest: "the public's interest in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State," *post,* at 9. We suspect the public would be surprised to learn that a criminal can freely sign away his right to a lawyer, confess his crimes, and then ask the courts to *assume* that the confession was coerced—on the ground that he had, at some earlier point in time, made a *pro forma* statement requesting that counsel be appointed on his behalf.

apart from *Jackson*, see *Patterson*, 487 U. S., at 292, n. 4, mistakes are of course possible when courts conduct case-by-case voluntariness review. A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.

But without *Jackson*, how many would be? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U. S., at 474. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. 451 U. S., at 484. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney." 498 U. S., at 153.

These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, *Cobb*, 532 U. S., at 175 (KENNEDY, J., concurring), it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.

It is true, as Montejo points out in his supplemental

brief, that the doctrine established by *Miranda* and *Edwards* is designed to protect Fifth Amendment, not Sixth Amendment, rights. But that is irrelevant. What matters is that these cases, like *Jackson,* protect the right to have counsel during custodial interrogation—which right happens to be guaranteed (once the adversary judicial process has begun) by *two* sources of law. Since the right under both sources is waived using the same procedure, *Patterson, supra,* at 296, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver.

Montejo also correctly observes that the *Miranda-Edwards* regime is narrower than *Jackson* in one respect: The former applies only in the context of custodial interrogation. If the defendant is not in custody then those decisions do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State (like pretrial lineups). However, those uncovered situations are the *least* likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering. And noninterrogative interactions with the State do not involve the "inherently compelling pressures," *Miranda, supra,* at 467, that one might reasonably fear could lead to involuntary waivers.

Jackson was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule. *Miranda* and the cases that elaborate upon it already guarantee not simply noncoercion in the traditional sense, but what Justice Harlan referred to as "voluntariness with a vengeance," 384 U. S., at 505 (dissenting opinion). There is no need to take *Jackson*'s further step of requiring voluntariness on stilts.

On the other side of the equation are the costs of adding the bright-line *Jackson* rule on top of *Edwards* and other extant protections. The principal cost of applying any

exclusionary rule "is, of course, letting guilty and possibly dangerous criminals go free . . . ." *Herring* v. *United States*, 555 U. S. ___, ___ (2009) (slip op., at 6). *Jackson* not only "operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless," *Cobb*, *supra*, at 174–175 (KENNEDY, J., concurring), but also deters law enforcement officers from even trying to obtain voluntary confessions. The "ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil*, 501 U. S., at 181. Without these confessions, crimes go unsolved and criminals unpunished. These are not negligible costs, and in our view the *Jackson* Court gave them too short shrift.[5]

Notwithstanding this calculus, Montejo and his *amici* urge the retention of *Jackson*. Their principal objection to its elimination is that the *Edwards* regime which remains will not provide an administrable rule. But this Court has praised *Edwards* precisely because it provides "'clear and unequivocal' guidelines to the law enforcement profession," *Arizona* v. *Roberson*, 486 U. S. 675, 682 (1988). Our cases make clear which sorts of statements trigger its protections, see *Davis* v. *United States*, 512 U. S. 452, 459 (1994), and once triggered, the rule operates as a bright line. Montejo expresses concern that courts will have to determine whether statements made at preliminary hearings constitute *Edwards* invocations—thus implicating all the practical problems of the Louisiana rule we discussed above, see Part II, *supra*. That concern is misguided. "We

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[5]The dissent claims that, in fact, few confessions have been suppressed by federal courts applying *Jackson*. *Post*, at 8. If so, that is because, as the dissent boasts, "generations of police officers have been trained to refrain from approaching represented defendants," *post*, at 9, n. 4. Anyway, if the rule truly does not hinder law enforcement or make much practical difference, see *post*, at 7–9, and nn. 3–4, then there is no reason to be particularly exercised about its demise.

have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'. . . ." *McNeil, supra,* at 182, n. 3. What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.

In sum, when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not "pay its way," *United States* v. *Leon,* 468 U. S. 897, 907–908, n. 6 (1984). *Michigan* v. *Jackson* should be and now is overruled.

V

Although our holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson,* we think that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards.* If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. *Davis, supra,* at 459. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an "unequivocal election of the right," *Cobb,* 532 U. S., at 176 (KENNEDY, J., concurring).

Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections. Our decision today, overruling *Jackson,* changes the legal landscape and does so in part based on the protections already provided by *Edwards.* Thus we think that a remand is appropriate so that Montejo can pursue this alternative avenue for relief. Montejo may also seek on

remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e.g.*, his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer, cf. *Moran*, 475 U. S., at 428–429. These matters have heightened importance in light of our opinion today.

We do not venture to resolve these issues ourselves, not only because we are a court of final review, "not of first view," *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), but also because the relevant facts remain unclear. Montejo and the police gave inconsistent testimony about exactly what took place on the afternoon of September 10, 2002, and the Louisiana Supreme Court did not make an explicit credibility determination. Moreover, Montejo's testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence. These matters are best left for resolution on remand.

We do reject, however, the dissent's revisionist legal analysis of the "knowing and voluntary" issue. *Post*, at 10–14. In determining whether a Sixth Amendment waiver was knowing and voluntary, there is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that, as we held in *Patterson*, the *Miranda* warnings adequately inform him "of his right to have counsel present during the questioning," and make him "aware of the consequences of a decision by him to waive his Sixth Amendment rights," 487 U. S., at 293. Somewhat surprisingly for an opinion that extols the virtues of *stare decisis*, the dissent complains that our "treatment of the waiver question rests entirely on the dubious decision in *Patterson*," *post*, at 12. The Court in *Patterson* did not consider the result dubious, nor does the Court today.

* * *

This case is an exemplar of Justice Jackson's oft quoted warning that this Court "is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *City of Jeannette*, 319 U. S. 157, 181 (1943) (opinion concurring in result). We today remove *Michigan* v. *Jackson*'s fourth story of prophylaxis.

The judgment of the Louisiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 07–1529

JESSE JAY MONTEJO, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[May 26, 2009]

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, concurring.

Earlier this Term, in *Arizona* v. *Gant*, 556 U. S. ___ (2009), the Court overruled *New York* v. *Belton*, 453 U. S. 454 (1981), even though that case had been on the books for 28 years, had not been undermined by subsequent decisions, had been recently reaffirmed and extended, had proven to be eminently workable (indeed, had been adopted for precisely that reason), and had engendered substantial law enforcement reliance. See *Gant*, *supra*, at ___ (slip op., at 4) (ALITO, J., dissenting). The Court took this step even though we were not asked to overrule *Belton* and this new rule is almost certain to lead to a host of problems. See *Gant, supra*, at ___ (slip op., at 10) (ALITO, J., dissenting); *Megginson* v. *United States*, *post*, p. ___; *Grooms* v. *United States*, *post*, p. ___.

JUSTICE SCALIA, who cast the deciding vote to overrule *Belton*, dismissed *stare decisis* concerns with the following observation: "[I]t seems to me ample reason that the precedent was badly reasoned and produces erroneous . . . results." *Gant*, *supra*, at ___ (slip op., at 3) (concurring opinion). This narrow view of *stare decisis* provides the only principle on which the decision in *Gant* can be justified.

In light of *Gant*, the discussion of *stare decisis* in today's

dissent* is surprising. The dissent in the case at hand criticizes the Court for "[a]cting on its own" in reconsidering *Michigan* v. *Jackson,* 475 U. S. 625 (1986). *Post,* at 4 (opinion of STEVENS, J.). But the same was true in *Gant,* and in this case, the Court gave the parties and interested *amici* the opportunity to submit supplemental briefs on the issue, a step not taken in *Gant.*

The dissent faults the Court for "cast[ing] aside the reliance interests of law enforcement," *post,* at 8–9, but in *Gant,* there were real and important law enforcement interests at stake. See 556 U. S., at ___ (slip op., at 5–6) (ALITO, J., dissenting). Even the Court conceded that the *Belton* rule had "been widely taught in police academies and that law enforcement officers ha[d] relied on the rule in conducting vehicle searches during the past 28 years." 556 U. S., at ___ (slip op., at 16). And whatever else might be said about *Belton,* it surely provided a bright-line rule.

A month ago, none of this counted for much, but today the dissent writes:

> "*Jackson*'s bright-line rule has provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether confessions will be admissible in court, and assisted judges in determining whether a defendant's Sixth Amendment rights have been violated by police interrogation." *Post,* at 8.

It is striking that precisely the same points were true in *Gant:*

> "[*Belton*'s] bright-line rule ha[d] provided law enforcement officers with clear guidance, allowed prose-

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*One of the dissenters in the present case, JUSTICE BREYER, also dissented in *Gant* and would have followed *Belton* on *stare decisis* grounds. See 556 U. S., at ___ (slip op., at 1). Thus, he would not overrule either *Belton* or *Michigan* v. *Jackson,* 475 U. S. 625 (1986).

> cutors to quickly and easily assess whether [evidence obtained in a vehicle search] w[ould] be admissible in court, and assisted judges in determining whether a defendant's [Fourth] Amendment rights ha[d] been violated by police interrogation." *Post*, at 8.

The dissent, finally, invokes *Jackson*'s antiquity, stating that "the 23-year existence of a simple bright-line rule" should weigh in favor of its retention. *Post*, at 9. But in *Gant*, the Court had no compunction about casting aside a 28-year-old bright-line rule. I can only assume that the dissent thinks that our constitutional precedents are like certain wines, which are most treasured when they are neither too young nor too old, and that *Jackson*, at 23, is in its prime, whereas *Belton*, at 28, had turned brownish and vinegary.

I agree with the dissent that *stare decisis* should promote "'the evenhanded . . . development of legal principles,'" *post*, at 6 (quoting *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991)). The treatment of *stare decisis* in *Gant* fully supports the decision in the present case.

SUPREME COURT OF THE UNITED STATES

No. 07–1529

JESSE JAY MONTEJO, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[May 26, 2009]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins, except for footnote 5, dissenting.

Today the Court properly concludes that the Louisiana Supreme Court's parsimonious reading of our decision in *Michigan* v. *Jackson*, 475 U. S. 625 (1986), is indefensible. Yet the Court does not reverse. Rather, on its own initiative and without any evidence that the longstanding Sixth Amendment protections established in *Jackson* have caused any harm to the workings of the criminal justice system, the Court rejects *Jackson* outright on the ground that it is "untenable as a theoretical and doctrinal matter." *Ante*, at 6. That conclusion rests on a misinterpretation of *Jackson*'s rationale and a gross undervaluation of the rule of *stare decisis*. The police interrogation in this case clearly violated petitioner's Sixth Amendment right to counsel.

I

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." The right to counsel attaches during "the initiation of adversary judicial criminal proceedings," *Rothgery* v. *Gillespie County*, 554 U. S. ___, ___ (2008) (slip op., at 5) (internal quotation

marks omitted), and it guarantees the assistance of counsel not only during in-court proceedings but during all critical stages, including postarraignment interviews with law enforcement officers, see *Patterson* v. *Illinois*, 487 U. S. 285, 290 (1988).

In *Jackson*, this Court considered whether the Sixth Amendment bars police from interrogating defendants who have requested the appointment of counsel at arraignment. Applying the presumption that such a request constitutes an invocation of the right to counsel "at every critical stage of the prosecution," 475 U. S., at 633, we held that "a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment" cannot be subject to uncounseled interrogation unless he initiates "exchanges or conversations with the police," *id.*, at 626.

In this case, petitioner Jesse Montejo contends that police violated his Sixth Amendment right to counsel by interrogating him following his "72-hour hearing" outside the presence of, and without prior notice to, his lawyer. The Louisiana Supreme Court rejected Montejo's claim. Relying on the fact that the defendants in *Jackson* had "requested" counsel at arraignment, the state court held that *Jackson*'s protections did not apply to Montejo because his counsel was appointed automatically; Montejo had not explicitly requested counsel or affirmatively accepted the counsel appointed to represent him before he submitted to police interrogation. 06–1807, pp. 28–29 (1/16/08), 974 So. 2d 1238, 1261.

I agree with the majority's conclusion that the Louisiana Supreme Court's decision, if allowed to stand, "would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States," *ante*, at 3. Neither option is tolerable, and neither is compelled by *Jackson* itself.

Our decision in *Jackson* involved two consolidated cases,

both arising in the State of Michigan. Under Michigan law in effect at that time, when a defendant appeared for arraignment the court was required to inform him that counsel would be provided if he was financially needy *and he requested representation.* Mich. Gen. Ct. Rule 785.4(1) (1976). It was undisputed that the *Jackson* defendants made such a "request" at their arraignment: one by completing an affidavit of indigency, and the other by responding affirmatively to a question posed to him by the court. See App. in *Michigan* v. *Jackson,* O. T. 1984, No. 84–1531, p. 168; App. in *Michigan* v. *Bladel,* O. T. 1984, No. 84–1539, pp. 3a–4a. In neither case, however, was it clear that counsel had actually been appointed at the arraignment. Thus, the defendants' requests for counsel were significant as a matter of state law because they served as evidence that the appointment of counsel had been effectuated even in the absence of proof that defense counsel had actual notice of the appointments.

Unlike Michigan, Louisiana does not require a defendant to make a request in order to receive court-appointed counsel. Consequently, there is no reason to place constitutional significance on the fact that Montejo neither voiced a request for counsel nor affirmatively embraced that appointment *post hoc.* Certainly our decision in *Jackson* did not mandate such an odd rule. See *ante,* at 4 (acknowledging that we had no occasion to decide in *Jackson* how its rule would apply in States that do not make appointment of counsel contingent on affirmative request). If a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer. Indeed, we have already recognized as much. See *Michigan* v. *Harvey,* 494 U. S. 344, 352 (1990) (acknowledging that "once a defendant obtains or even requests counsel," *Jackson* alters the waiver analysis); *Patterson,* 487 U. S.,

at 290, n. 3 (noting "as a matter of some significance" to the constitutional analysis that defendant had "not retained, or *accepted by appointment*, a lawyer to represent him at the time he was questioned by authorities" (emphasis added)).[1] Once an attorney-client relationship has been established through the appointment or retention of counsel, as a matter of federal law the method by which the relationship was created is irrelevant: The existence of a valid attorney-client relationship provides a defendant with the full constitutional protection afforded by the Sixth Amendment.

II

Today the Court correctly concludes that the Louisiana Supreme Court's holding is "troublesome," *ante*, at 4, "impractical," *ante*, at 5, and "unsound," *ante*, at 6. Instead of reversing the decision of the state court by simply answering the question on which we granted certiorari in a unanimous opinion, however, the majority has decided to change the law. Acting on its own initiative, the majority overrules *Jackson* to correct a "theoretical and doctrinal" problem of its own imagining, see *ante*, at 6. A more careful reading of *Jackson* and the Sixth Amendment cases upon which it relied reveals that the rule announced in *Jackson* protects a fundamental right that the Court now dishonors.

The majority's decision to overrule *Jackson* rests on its assumption that *Jackson*'s protective rule was intended to "prevent police from badgering defendants into changing their minds about their rights," *ante*, at 10; see also *ante*,

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[1] In *Patterson* v. *Illinois*, we further explained, "[o]nce an accused has a lawyer," "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." 487 U. S., at 290, n. 3 (citing *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985)). "Indeed," we emphasized, "the analysis changes markedly once an accused even *requests* the assistance of counsel." 487 U. S., at 290, n. 3.

at 13, just as the rule adopted in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), was designed to prevent police from coercing unindicted suspects into revoking their requests for counsel at interrogation. Operating on that limited understanding of the purpose behind *Jackson*'s protective rule, the Court concludes that *Jackson* provides no safeguard not already secured by this Court's Fifth Amendment jurisprudence. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966) (requiring defendants to be admonished of their right to counsel prior to custodial interrogation); *Edwards*, 451 U. S. 477 (prohibiting police-initiated interrogation following defendant's invocation of the right to counsel).

The majority's analysis flagrantly misrepresents *Jackson*'s underlying rationale and the constitutional interests the decision sought to protect. While it is true that the rule adopted in *Jackson* was patterned after the rule in *Edwards*, 451 U. S., at 484–485, the *Jackson* opinion does not even mention the anti-badgering considerations that provide the basis for the Court's decision today. Instead, *Jackson* relied primarily on cases discussing the broad protections guaranteed by the Sixth Amendment right to counsel—not its Fifth Amendment counterpart. *Jackson* emphasized that the purpose of the Sixth Amendment is to "'protec[t] the unaided layman at critical confrontations with his adversary,'" 475 U. S., at 631 (quoting *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984)), by giving him "'the right to rely on counsel as a 'medium' between him[self] and the State,'" 475 U. S., at 632 (quoting *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985)). Underscoring that the commencement of criminal proceedings is a decisive event that transforms a suspect into an accused within the meaning of the Sixth Amendment, we concluded that arraigned defendants are entitled to "at least as much protection" during interrogation as the Fifth Amendment affords unindicted suspects. See, *e.g.*, 475 U. S., at 632 ("[T]he *difference* between the legal basis for the rule

applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances" (emphasis added)). Thus, although the rules adopted in *Edwards* and *Jackson* are similar, *Jackson* did not rely on the reasoning of *Edwards* but remained firmly rooted in the unique protections afforded to the attorney-client relationship by the Sixth Amendment.[2]

Once *Jackson* is placed in its proper Sixth Amendment context, the majority's justifications for overruling the decision crumble. Ordinarily, this Court is hesitant to disturb past precedent and will do so only when a rule has proven "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986). While *stare decisis* is not "an inexorable command," we adhere to it as "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial proc-

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[2]The majority insists that protection from police badgering is the only purpose the *Jackson* rule can plausibly serve. After all, it asks, from what other evil would the rule guard? See *ante*, at 9. There are two obvious answers. First, most narrowly, it protects the defendant from any police-initiated interrogation without notice to his counsel, not just from "badgering" which is not necessarily a part of police questioning. Second, and of prime importance, it assures that any waiver of counsel will be valid. The assistance offered by counsel protects a defendant from surrendering his rights with an insufficient appreciation of what those rights are and how the decision to respond to interrogation might advance or compromise his exercise of those rights throughout the course of criminal proceedings. A lawyer can provide her client with advice regarding the legal and practical options available to him; the potential consequences, both good and bad, of choosing to discuss his case with police; the likely effect of such a conversation on the resolution of the charges against him; and an informed assessment of the best course of action under the circumstances. Such assistance goes far beyond mere protection against police badgering.

ess." *Payne* v. *Tennessee*, 501 U. S. 808, 827–828 (1991).

Paying lip service to the rule of *stare decisis*, the majority acknowledges that the Court must consider many factors before taking the dramatic step of overruling a past decision. See *ante*, at 12. Specifically, the majority focuses on four considerations: the reasoning of the decision, the workability of the rule, the reliance interests at stake, and the antiquity of the precedent. The Court exaggerates the considerations favoring reversal, however, and gives short shrift to the valid considerations favoring retention of the *Jackson* rule.

First, and most central to the Court's decision to overrule *Jackson*, is its assertion that *Jackson*'s "'reasoning'"—which the Court defines as "the weighing of the [protective] rule's benefits against its costs," *ante*, at 14—does not justify continued application of the rule it created. The balancing test the Court performs, however, depends entirely on its misunderstanding of *Jackson* as a rule designed to prevent police badgering, rather than a rule designed to safeguard a defendant's right to rely on the assistance of counsel.[3]

Next, in order to reach the conclusion that the *Jackson*

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[3]Even accepting the majority's improper framing of *Jackson*'s foundation, the Court fails to show that the costs of the rule are more than negligible or differ from any other protection afforded by the right to counsel. The majority assumes, without citing any empirical or even anecdotal support, that any marginal benefits of the *Jackson* rule are "dwarfed by its substantial costs," which it describes as harm to "'society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Ante*, at 14 (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)). That assumption is highly dubious, particularly in light of the fact that several *amici* with interest in law enforcement have conceded that the application of *Jackson*'s protective rule rarely impedes prosecution. See Supplemental Brief for Larry D. Thompson et al. as *Amici Curiae* 6 (hereinafter Thompson Supplemental Brief); Brief for United States as *Amicus Curiae* 12 (hereinafter United States Brief).

rule is unworkable, the Court reframes the relevant inquiry, asking not whether the *Jackson* rule as applied for the past quarter century has proved easily administrable, but instead whether the Louisiana Supreme Court's cramped interpretation of that rule is practically workable. The answer to that question, of course, is no. When framed more broadly, however, the evidence is overwhelming that *Jackson*'s simple, bright-line rule has done more to advance effective law enforcement than to undermine it.

In a supplemental brief submitted by lawyers and judges with extensive experience in law enforcement and prosecution, *amici* Larry D. Thompson et al. argue persuasively that *Jackson*'s bright-line rule has provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether confessions will be admissible in court, and assisted judges in determining whether a defendant's Sixth Amendment rights have been violated by police interrogation. See generally Thompson Supplemental Brief 6. While *amici* acknowledge that "*Jackson* reduces opportunities to interrogate defendants" and "may require exclusion of evidence that could support a criminal conviction," they maintain that "it is a rare case where this rule lets a guilty defendant go free." *Ibid.* Notably, these representations are not contradicted by the State of Louisiana or other *amici*, including the United States. See United States Brief 12 (conceding that the *Jackson* rule has not "resulted in the suppression of significant numbers of statements in federal prosecutions in the past").[4] In short, there is substantial evidence sug-

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[4]Further supporting the workability of the *Jackson* rule is the fact that it aligns with the professional standards and norms that already govern the behavior of police and prosecutors. Rules of Professional Conduct endorsed by the American Bar Association (ABA) and by every State Bar Association in the country prohibit prosecutors from making direct contact with represented defendants in all but the most limited of circumstances, see App. to Supplemental Brief for Public Defender

gesting that *Jackson*'s rule is not only workable, but also desirable from the perspective of law enforcement.

Turning to the reliance interests at stake in the case, the Court rejects the interests of criminal defendants with the flippant observation that any who are knowledgeable enough to rely on *Jackson* are too savvy to need its protections, and casts aside the reliance interests of law enforcement on the ground that police and prosecutors remain free to employ the *Jackson* rule if it suits them. See *ante*, at 12. Again as a result of its mistaken understanding of the purpose behind *Jackson*'s protective rule, the Court fails to identify the real reliance interest at issue in this case: the public's interest in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State. That interest lies at the heart of the Sixth Amendment's guarantee, and is surely worthy of greater consideration than it is given by today's decision.

Finally, although the Court acknowledges that "antiquity" is a factor that counsels in favor of retaining precedent, it concludes that the fact *Jackson* is "only two decades old" cuts "in favor of abandoning" the rule it established. *Ante*, at 13. I would have thought that the

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Service for the District of Columbia et al. as *Amici Curiae* 1a–15a (setting forth state rules governing contact with represented persons); ABA Model Rule of Professional Conduct 4.2 (2008); 28 U. S. C. §530B(a) (making state rules of professional conduct applicable to federal attorneys), and generations of police officers have been trained to refrain from approaching represented defendants, both because *Jackson* requires it and because, absent direction from prosecutors, officers are reticent to interrogate represented defendants. See United States Brief 11–12; see also Thompson Supplemental Brief 13 (citing Federal Bureau of Investigation, Legal Handbook for Special Agents §7–4.1(7) (2003)). Indeed, the United States concedes that a decision to overrule the case "likely w[ill] not significantly alter the manner in which federal law enforcement agents investigate indicted defendants." United States Brief 11–12.

23-year existence of a simple bright-line rule would be a factor that cuts in the other direction.

Despite the fact that the rule established in *Jackson* remains relevant, well grounded in constitutional precedent, and easily administrable, the Court today rejects it *sua sponte*. Such a decision can only diminish the public's confidence in the reliability and fairness of our system of justice.[5]

III

Even if *Jackson* had never been decided, it would be clear that Montejo's Sixth Amendment rights were violated. Today's decision eliminates the rule that "any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid" once a defendant has invoked his right to counsel. *Harvey*, 494 U. S., at 349 (citing *Jackson*, 475 U. S., at 636). Nevertheless, under the undisputed facts of this case, there is no sound basis for concluding that Montejo made a knowing and valid waiver of his Sixth Amendment right to counsel before acquiescing in police interrogation following his 72-hour hearing. Because police questioned Montejo without notice to, and outside the presence of, his lawyer, the

[5] In his concurrence, JUSTICE ALITO assumes that my consideration of the rule of *stare decisis* in this case is at odds with the Court's recent rejection of his reliance on that doctrine in his dissent in *Arizona* v. *Gant*, 556 U. S. ___ (2009). While I agree that the reasoning in his dissent supports my position in this case, I do not agree with his characterization of our opinion in *Gant*. Contrary to his representation, the Court did not overrule our precedent in *New York* v. *Belton*, 453 U. S. 454 (1981). Rather, we affirmed the narrow interpretation of *Belton*'s holding adopted by the Arizona Supreme Court, rejecting the broader interpretation adopted by other lower courts that had been roundly criticized by judges and scholars alike. By contrast, in this case the Court flatly overrules *Jackson*—a rule that has drawn virtually no criticism—on its own initiative. The two cases are hardly comparable. If they were, and if JUSTICE ALITO meant what he said in *Gant*, I would expect him to join this opinion.

interrogation violated Montejo's right to counsel even under pre-*Jackson* precedent.

Our pre-*Jackson* case law makes clear that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Moulton*, 474 U. S., at 176. The Sixth Amendment entitles indicted defendants to have counsel notified of and present during critical confrontations with the state throughout the pretrial process. Given the realities of modern criminal prosecution, the critical proceedings at which counsel's assistance is required more and more often occur outside the courtroom in pretrial proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U. S. 218, 224 (1967).

In *Wade*, for instance, we held that because a post-indictment lineup conducted for identification purposes is a critical stage of the criminal proceedings, a defendant and his counsel are constitutionally entitled to notice of the impending lineup. Accordingly, counsel's presence is a "requisite to conduct of the lineup, absent an intelligent waiver." *Id.*, at 237 (internal quotation marks omitted). The same reasoning applies to police decisions to interrogate represented defendants. For if the Sixth Amendment entitles an accused to such robust protection during a lineup, surely it entitles him to such protection during a custodial interrogation, when the stakes are as high or higher. Cf. *Spano* v. *New York*, 360 U. S. 315, 326 (1959) (Douglas, J., concurring) ("[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?").

The Court avoids confronting the serious Sixth Amendment concerns raised by the police interrogation in this

case by assuming that Montejo validly waived his Sixth Amendment rights before submitting to interrogation.[6] It does so by summarily concluding that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver," *ante*, at 15–16; thus, because Montejo was given *Miranda* warnings prior to interrogation, his waiver was presumptively valid. Ironically, while the Court faults *Jackson* for blurring the line between this Court's Fifth and Sixth Amendment jurisprudence, it commits the same error by assuming that the *Miranda* warnings given in this case, designed purely to safeguard the Fifth Amendment right against self-incrimination, were somehow adequate to protect Montejo's more robust Sixth Amendment right to counsel.

The majority's cursory treatment of the waiver question rests entirely on the dubious decision in *Patterson*, in which we addressed whether, by providing *Miranda* warnings, police had adequately advised an indicted but unrepresented defendant of his Sixth Amendment right to counsel. The majority held that "[a]s a general matter . . . an accused who is admonished with the warnings prescribed . . . in *Miranda*, . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights." 487 U. S., at 296. The Court recognized, however, that "because the Sixth Amendment's protection of the attorney-client relationship

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[6]The majority leaves open the possibility that, on remand, Montejo may argue that his waiver was invalid because police falsely told him he had not been appointed counsel. See *ante*, at 18. While such police deception would obviously invalidate any otherwise valid waiver of Montejo's Sixth Amendment rights, Montejo has a strong argument that, given his status as a *represented* criminal defendant, the *Miranda* warnings given to him by police were insufficient to permit him to make a knowing waiver of his Sixth Amendment rights even absent police deception.

. . . extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, . . . there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." *Id.*, at 297, n. 9. This is such a case.

As I observed in *Patterson*, the conclusion that *Miranda* warnings ordinarily provide a sufficient basis for a knowing waiver of the right to counsel rests on the questionable assumption that those warnings make clear to defendants the assistance a lawyer can render during post-indictment interrogation. See 487 U. S., at 307 (dissenting opinion). Because *Miranda* warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police, I remain convinced that the warnings prescribed in *Miranda*,[7] while sufficient to apprise a defendant of his Fifth Amendment right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution. The inadequacy of those warnings is even more obvious in the case of a *represented* defendant. While it can be argued that informing an indicted but unrepresented defendant of his right to counsel at least alerts him to the fact that he is entitled to obtain something he does not already possess, providing that same warning to a defendant who has *already* secured counsel is more likely to confound than enlighten.[8] By glibly assuming that that the *Miranda*

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[7] Under *Miranda*, a suspect must be "warned prior to any questioning that he has the right to remain silent, that anything he says may be used against him in court of law, that he has the right to the presence of any attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires." 384 U. S., at 479.

[8] With respect to vulnerable defendants, such as juveniles and those with mental impairments of various kinds, *amici* National Association of Criminal Defense Lawyers et al. assert that "[o]verruling *Jackson* would be particularly detrimental . . . because of the confusing instruc-

warnings given in this case were sufficient to ensure Montejo's waiver was both knowing and voluntary, the Court conveniently avoids any comment on the actual advice Montejo received, which did not adequately inform him of his relevant Sixth Amendment rights or alert him to the possible consequences of waiving those rights.

A defendant's decision to forgo counsel's assistance and speak openly with police is a momentous one. Given the high stakes of making such a choice and the potential value of counsel's advice and mediation at that critical stage of the criminal proceedings, it is imperative that a defendant possess "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," *Moran* v. *Burbine*, 475 U. S. 412, 421 (1986), before his waiver is deemed valid. See *Iowa* v. *Tovar*, 541 U. S. 77, 81 (2004); *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Because the administration of *Miranda* warnings was insufficient to ensure Montejo understood the Sixth Amendment right he was being asked to surrender, the record in this case provides no basis for concluding that Montejo validly waived his right to counsel, even in the absence of *Jackson*'s enhanced protections.

IV

The Court's decision to overrule *Jackson* is unwarranted. Not only does it rests on a flawed doctrinal prem-

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tions regarding counsel that they would receive. At the initial hearing, they would likely learn that an attorney was being appointed for them, In a later custodial interrogation, however, they would be informed in the traditional manner of 'their right to counsel' and right to have counsel 'appointed' if they are indigent, notwithstanding that counsel had already been appointed in open court. These conflicting statements would be confusing to anyone, but would be especially baffling to defendants with mental disabilities or other impairments." Supplemental Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 7–8.

ise, but the dubious benefits it hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel. Moreover, even apart from the protections afforded by *Jackson*, the police interrogation in this case violated Jesse Montejo's Sixth Amendment right to counsel.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 07–1529

JESSE JAY MONTEJO, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[May 26, 2009]

JUSTICE BREYER, dissenting.

I join JUSTICE STEVENS' dissent except for footnote 5. Although the principles of *stare decisis* are not inflexible, I believe they bind the Court here. I reached a similar conclusion in *Arizona* v. *Gant*, 556 U. S. ___, ___–___ (2009) (slip op., at 1–2) (BREYER, J., dissenting), and in several other recent cases. See, *e.g.*, *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, ___–___ (2007) (slip op., at 17–19) (BREYER, J., dissenting); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, ___–___ (2007) (slip op., at 65–66) (BREYER, J., dissenting); *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, ___–___ (2007) (slip op., at 31–32) (SOUTER, J., dissenting); *Bowles* v. *Russell*, 551 U. S. 205, 219–220 (2007) (SOUTER, J., dissenting); *Gonzales* v. *Carhart*, 550 U. S. 124, 190–191 (2007) (GINSBURG, J., dissenting); *District of Columbia* v. *Heller*, 554 U. S. ___, ___–___ (2008) (slip op. at 41–45) (STEVENS, J., dissenting).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA :

VS. : **Crim. No.**_____

_____ :
Defendant

ASSERTION OF FIFTH AND SIXTH AMENDMENT RIGHTS

I, the above named defendant, hereby assert my Fifth and Sixth Amendment rights to remain silent and to have counsel present at any and all of my interactions with the government or its agents. I will not waive any of my constitutional rights except in the presence of counsel, and I do not want the government or its agents to contact me seeking my waiver of any rights unless my counsel is present.

_____
(Defendant's signature)

_____
(Attorney's name/address printed)

_____
(Attorney's signature)

Date:_____ Time:_____ a.m. / p.m.

Business Card-sized assertion

Assertion of Rights

I assert my Fifth and Sixth Amendment rights to remain silent and to have counsel present at any and all of my interactions with the government or its agents. I will not waive any of my constitutional rights except in the presence of counsel, and I do not want the government or its agents to contact me seeking my waiver of any rights unless my counsel is present.

LETTER TO EXISTING CLIENTS

Dear Mr./Ms. _____

On May 26, 2009 the United States Supreme Court[1] changed the rules concerning when police officers are permitted to approach and attempt to question criminal defendants who are represented by attorneys.

- You should **NEVER** agree to speak to a law enforcement officer unless they first contact me and ask for my permission. If it is in your interest to speak to law enforcement, I will assist in making the arrangements and, most likely, will be present.

- It is now up to **YOU** to tell police officers that you are asserting your constitutional right not to speak with them. This is what you should tell them:

> **I assert my Fifth and Sixth Amendment rights to remain silent and to have counsel present at any and all of my interactions with the government or its agents. I will not waive any of my constitutional rights except in the presence of counsel, and I do not want the government or its agents to contact me seeking my waiver of any rights unless my counsel is present.**

Try to make sure that other people hear you when you assert your rights.

- Once you tell them that you do not wish to speak to law enforcement without an attorney present, they should stop questioning you. If they continue to try to persuade you to cooperate, you must repeat that you are not interested in speaking to them.

- It is important that you let me know any time a law enforcement officer tries to speak with you.

REMEMBER, any thing you tell law enforcement officers can be used against you in court proceedings. Even things you believe are helpful can end up doing serious damage to your case. Do not say **ANYTHING** to law enforcement when they attempt to question you.

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[1]In *Montejo v. Louisiana*, 2009 WL 1443049 (May 26, 2009)

Please let me know if you have any questions about this.

Sincerely,

Assistant Federal Defender

LANGUAGE FOR FRONT COVER OF OUR BOOKLET FOR CLIENTS

IMPORTANT!!

NEVER agree to speak with law enforcement officers unless your lawyer clearly says you can. Have them contact the Federal Defender's Office. If a law enforcement officer attempts to speak to you about your case, give them this reply, and nothing else:

> **I assert my Fifth and Sixth Amendment rights to remain silent and to have counsel present at any and all of my interactions with the government or its agents. I will not waive any of my constitutional rights except in the presence of counsel, and I do not want the government or its agents to contact me seeking my waiver of any rights unless my counsel is present.**

TO PROFFER
OR
NOT TO PROFFER

PRESENTED BY

DEAN STOWERS
CJA ATTORNEY
STOWERS LAW FIRM
WEST DES MOINES, IOWA

To Proffer or Not; That is the Question.

Dean Stowers
Stowers Law Firm
West Glen Town Center
The Hub Building, Suite 130
650 S. Prairie View Drive
West Des Moines, IA 50266
Phone: 515-224-7446
Fax: 515-225-6215
Email: dean@stowerslaw.com

I. What is a proffer?

A. A full confession given by the Defendant to law enforcement and the prosecution upon advice of counsel.

B. An offer or tender by the Defendant of information of interest to law enforcement and the prosecution in pursuit of persons involved in criminal activity.

II. What a proffer is not.

A. A proffer is not a plea agreement or other assurance of leniency by Government.

B. A proffer agreement is generally not an agreement to provide immunity from prosecution (a/k/a transactional immunity).

C. A proffer agreement is generally not co-extensive with a grant of immunity sufficient to overcome a claim of the privilege against self-incrimination.

1. Generally, proffer agreements provide only limited "use" immunity.

2. Generally, proffer agreements provide no "derivative use" immunity.

3. Generally, proffer agreements expressly waive Kastigar hearing procedures.

4. Contrast grant of judicial immunity pursuant to 18 U.S.C. Section 6002 and limited "use" immunity of typical proffer.

III. Reason to proffer

A. Safety Valve. U.S.S.G. Section 5C1.2.

B. Client is a "Gold Mine" of information.

C. Clarify client's role in offense to secure better plea.

IV. Reasons not to proffer.

A. No 1B1.8 protection and client would receive higher guideline sentence if he fully proffered and likely substantial assistance reduction would not result in lower sentence without a proffer.

B. Client won't proffer at all, or wants to tell B.S. story.

C. Proffer agreement does not adequately protect client from prosecution for other offenses, including crimes of violence.

D. A favorable plea agreement can be reached without a proffer first. Generally, this is preferable to a proffer without a plea agreement.

E. Client knows nothing of value and Government is offering no likely benefit from proffer.

U.S.C.A. §§ 6001-6005, 6002, 6003.

[4] Witnesses 410 ⚷304(3)

410 Witnesses
410III Examination
410III(D) Privilege of Witness
410k304 Effect of Statutory Protection of Witness from Use of Evidence Against Himself
410k304(3) k. Sufficiency of Statutory Protection. Most Cited Cases
Grant of immunity, to supplant privilege against compulsory self-incrimination, must be coextensive with scope of privilege. U.S.C.A.Const. Amend. 5; 18 U.S.C.A. §§ 6001-6005, 6002, 6003; 49 U.S.C.A. § 46.

[5] Witnesses 410 ⚷304(3)

410 Witnesses
410III Examination
410III(D) Privilege of Witness
410k304 Effect of Statutory Protection of Witness from Use of Evidence Against Himself
410k304(3) k. Sufficiency of Statutory Protection. Most Cited Cases
Though grant of immunity must afford protection commensurate with that afforded by privilege against compulsory self-incrimination, it need not be broader, and immunity from use and derivative use is coextensive with scope of privilege and is sufficient to compel testimony over claim of privilege; transactional immunity is not required. U.S.C.A.Const. Amend. 5; 18 U.S.C.A. §§ 6001-6005, 6002, 6003; 49 U.S.C.A. § 46.

[6] Courts 106 ⚷92

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k92 k. Dicta. Most Cited Cases
Broad language of opinion which was unnecessary to court's decision could not be considered binding authority.

[7] Criminal Law 110 ⚷327

110 Criminal Law
110XVII Evidence
110XVII(C) Burden of Proof
110k326 Burden of Proof
110k327 k. Extent of Burden on Prosecution. Most Cited Cases
In subsequent criminal prosecution of person who has been compelled to testify under grant of immunity, prosecution has burden of proving affirmatively that evidence proposed to be used is derived from legitimate source wholly independent of compelled testimony. U.S.C.A.Const. Amend. 5; 18 U.S.C.A. §§ 6001-6005, 6002, 6003.

****1654 *441** Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit, Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 U.S.C. s 6002, from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings, as such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege. Transactional immunity would afford broader protection than the Fifth Amendment privilege, and is not constitutionally required. In a subsequent criminal prosecution, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony. Pp. 1655-1666.

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440 F.2d 954, affirmed.
**1655 Hugh R. Manes, Los Angeles, Cal., for petitioners.

Sol. Gen. Erwin N. Griswold, for respondent.

*442 Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U.S.C. ss 6002, 6003. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony. The District Court rejected this contention, and ordered petitioners to appear before the grand jury and answer its questions under the grant of immunity.

Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination. They were brought before the District Court, and each persisted in his refusal to answer the grand jury's questions, notwithstanding the grant of immunity. The court found both in contempt, and committed them to the custody of the Attorney General until either they answered the grand jury's questions or the term of the grand jury expired.[FN1] The Court of *443 Appeals for the Ninth Circuit affirmed. Stewart v. United States, 440 F.2d 954 (CA9 1971). This Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity). 402 U.S. 971, 91 S.Ct. 1668, 29 L.Ed.2d 135 (1971).

FN1. The contempt order was issued pursuant to 28 U.S.C. s 1826.

I

The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence.[FN2] The power with respect to courts was established by statute in England as early as 1562,[FN3] and Lord Bacon observed in 1612 that all subjects owed the King their 'knowledge and discovery.'[FN4] While it is not clear when grand juries first resorted to compulsory process to secure the attendance and testimony of witnesses, the general common-law principle that 'the public has a right to every man's evidence' was considered an 'indubitable certainty' that 'cannot be denied' by 1742.[FN5] The **1656 power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment*444 requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts.[FN6] Mr. Justice White noted the importance of this essential power of government in his concurring opinion in Murphy v. Waterfront Comm'n, 378 U.S.

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52, 93-94, 84 S.Ct. 1594, 1611, 12 L.Ed.2d 678 (1964):

FN2. For a concise history of testimonial compulsion prior to the adoption of our Constitution, see 8 J. Wigmore, Evidence s 2190 (J. McNaughton rev. 1961). See Ullmann v. United States, 350 U.S. 422, 439 n. 15, 76 S.Ct. 497, 507, 100 L.Ed. 511 (1956); Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919).

FN3. Statute of Elizabeth, 5 Eliz. 1, c. 9, s 12 (1562).

FN4. Countess of Shrewsbury's Case, 2 How.St.Tr. 769, 778 (1612).

FN5. See the parliamentary debate on the Bill to Indemnify Evidence, particularly the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. Hansard, Parliamentary History of England 675, 693 (1812). See also Piemonte v. United States, 367 U.S. 556, 559 n. 2, 81 S.Ct. 1720, 1722, 6 L.Ed.2d 1028 (1961); Ullmann v. United States, supra, 350 U.S., at 439 n. 15, 76 S.Ct., at 507; Brown v. Walker, 161 U.S. 591, 600, 16 S.Ct. 644, 648, 40 L.Ed. 819 (1896).

FN6. 1 Stat. 73, 88-89.

'Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979. Such testimony constitutes one of the Government's primary sources of information.'

[1][2] But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty,[FN7] the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, [FN8] and marks an important advance in the development of our liberty. [FN9] It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory;[FN10] and it *445 protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.[FN11] This Court has been zealous to safeguard the values which underlie the privilege.[FN12]

FN7. See Blair v. United States, supra, 250 U.S., at 281, 39 S.Ct., at 471; 8 Wigmore, supra, n. 2, ss 2192, 2197.

FN8. See Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964).

FN9. See Ullmann v. United States, 350 U.S., at 426, 76 S.Ct., at 500; E. Griswold, The Fifth Amendment Today 7 (1955).

FN10. Murphy v. Waterfront Comm'n, supra, 378 U.S., at 94, 84 S.Ct., at 1611 (White, J., concurring); McCarthy v. Arndstein, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924); United States v. Saline Bank, 1 Pet. 100, 7 L.Ed. 69 (1828); cf. Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968).

FN11. Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951); Blau v. United States, 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170 (1950); Mason v. United States, 244 U.S. 362, 365, 37 S.Ct. 621, 622, 61 L.Ed. 1198 (1917).

FN12. See, e.g., Miranda v. Arizona, 384 U.S. 436, 443-444, 86 S.Ct. 1602, 1611-1612, 16 L.Ed.2d 694 (1966); Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 534, 29 L.Ed. 746 (1886).

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Immunity statutes, which have historical roots deep in Anglo-American jurisprudence,[FN13] are not incompatible ***446** with ****1657** these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses,[FN14] ***447** and their primary use has been to investigate such offenses.[FN15] Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century.[FN16] Indeed, prior to the enactment of the statute under consideration in ****1658** this case, there were in force over 50 federal immunity statutes.[FN17] In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes. [FN18] The commentators,[FN19] and this Court on several occasions, [FN20] have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), such statutes have 'become part of our constitutional fabric.'[FN21] Id., at 438, 76 S.Ct., at 506.

FN13. Soon after the privilege against compulsory self-incrimination became firmly established in law, it was recognized that the privilege did not apply when immunity, or 'indemnity,' in the English usage, had been granted. See L. Levy, Origins of the Fifth Amendment 328, 495 (1968). Parliament enacted in immunity statute in 1710 directed against illegal gambling, 9 Anne, c. 14, ss 3-4, which became the model for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York. Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894). These statutes provided that the loser could sue the winner, who was compelled to answer the loser's charges. After the winner responded and returned his illgotten gains, he was 'acquitted, indemnified (immunized) and discharged from any further or other Punishment, Forfeiture or Penalty, which he . . . may have incurred by the playing for, and winning such Money . . ..' 9 Anne, c. 14, s 4 (1710); Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of New York, at 623.

Another notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying. Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery. Lord Chancellor Macclesfield's Trial, 16 How.St.Tr. 767, 1147 (1725). See 8 Wigmore, supra, n. 2, s 2281, at 492. See also Bishop Atterbury's Trial, 16 How.St.Tr. 323, 604-605 (1723). The legislatures in colonial Pennsylvania and New York enacted immunity legislation in the 18th century. See, e.g., Resolution of Jan. 6, 1758, in Votes and Proceedings of the House of Representatives of the Province of Pennsylvania (1682-1776), 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of Mar. 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 353-354; Law of Mar. 9, 1774, c. 1651, id., at 621, 623; Law of Mar. 9, 1774, c. 1655, id., at 639, 641-642. See generally L. Levy, Origins of the Fifth Amendment 359, 384-385, 389, 402-403 (1968). Federal immunity statutes have existed since 1857. Act of Jan. 24, 1857, 11

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Stat. 155. For a history of the various federal immunity statutes, see Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L.J. 1568 (1963); Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 St. louis U.L.Rev. 327 (1966); and National Commission on Reform of Federal Criminal Laws, Working Papers, 1406-1411 (1970).

FN14. See, e.g., Resolution of Jan. 6, 1758, n. 13, supra, 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of Mar. 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 354; Law of Mar. 9, 1774, c. 1655, id., at 639, 642. Bishop Atterbury's Trial, supra, for which the House of Commons passed immunity legislation, was a prosecution for treasonable conspiracy. See id., at 604-605; 8 Wigmore, supra, n. 2, s 2281, at 492 n. 2. supra, n. 2, s 2281, at 492 n. 2. for which Parliament passed immunity legislation, was a prosecution for political bribery involving the sale of public offices and appointments. See id., at 1147. The first federal immunity statute was enacted to facilitate an investigation of charges of corruption and vote buying in the House of Representatives. See Comment, n. 13, supra, 72 Yale L.J., at 1571.

FN15. See 8 Wigmore, supra, n. 2, s 2281, at 492. Mr. Justice White noted in his concurring opinion in Murphy v. Waterfront Comm'n, 378 U.S., at 92, 84 S.Ct., at 1610, that immunity statutes 'have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, extortion, gambling, consumer frauds, liquor violations, commercial larceny, and various forms of racketeering.' Id., at 94-95, 84 S.Ct., at 1611. See n. 14, supra.

FN16. See Comment, n. 13, supra, 72 Yale L.J., at 1576.

FN17. For a listing of these statutes, see National Commission on Reform of Federal Criminal Laws, Working Papers, 1444-1445 (1970).

FN18. For a listing of these statutes, see 8 Wigmore, supra, n. 2, s 2281, at 495 n. 11.

FN19. See, e.g., 8 J. Wigmore, Evidence s 2281, at 501 (3d ed. 1940); 8 Wigmore, supra, n. 2 s 2281, at 496.

FN20. See Hale v. Henkel, 201 U.S. 43, 70, 26 S.Ct. 370, 377, 50 L.Ed. 652 (1906); Brown v. Walker, 161 U.S., at 610, 16 S.Ct., at 652.

FN21. This statement was made with specific reference to the Compulsory Testimony Act of 1893, 27 Stat. 443, the model for almost all federal immunity statutes prior to the enactment of the statute under consideration in this case. See Murphy v. Waterfront Comm'n, 378 U.S., at 95, 84 S.Ct., at 1612 (White, J., concurring).

***448** II

[3] Petitioners contend, first, that the Fifth Amendment's privilege against compulsory self-incrimination, which is that '(n)o person .. . shall be compelled in any criminal case to be a witness against himself,' deprives Congress of power to enact laws that compel self-incrimination, even if complete immunity from prosecution is granted prior to the compulsion of the incriminatory testimony. In other words, petitioners assert that no immunity statute, however drawn, can afford a lawful

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basis for compelling incriminatory testimony. They ask us to reconsider and overrule Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896), and Ullmann v. United States, supra, decisions that uphold the constitutionality of immunity statutes.[FN22]

FN22. Accord, Gardner v. Broderick, 392 U.S., at 276, 88 S.Ct., at 1915; Murphy v. Waterfront Comm'n, supra; McCarthy v. Arndstein, 266 U.S., at 42, 45 S.Ct., at 17 (Brandeis, J.); Heike v. United States, 227 U.S. 131, 142, 33 S.Ct. 226, 228, 57 L.Ed. 450 (1913) (Holmes, J.).

We find no merit to this contention and reaffirm the decisions in Brown and Ullmann.

III

[4] Petitioners' second contention is that the scope of immunity provided by the federal witness immunity statute, 18 U.S.C. s 6002, is not coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege. The statute provides that when a witness is compelled by district court order to testify over a claim of the privilege:

'the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information ***449** directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.'[FN23] 18 U.S.C. s 6002.

FN23. For other provisions of the 1970 Act relative to immunity of witnesses, see 18 U.S.C. ss 6001-6005.

****1659** The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege.[FN24] If so, petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects. Brown v. Walker, supra. If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgments of contempt must be vacated. McCarthy v. Arndstein, 266 U.S. 34, 42, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924).

FN24. See, e.g., Murphy v. Waterfront Comm'n, supra, 378 U.S. at 54, 78, 84 S.Ct., at 1596, 1609, 12 L.Ed.2d 678; Counselman v. Hitchcock, 142 U.S. 547, 585, 12 S.Ct. 195, 206, 35 L.Ed. 1110 (1892).

Petitioners draw a distinction between statutes that provide transactional immunity and those that provide, as does the statute before us, immunity from use and derivative use.[FN25] They contend that a statute must at a minimum grant full transactional immunity in order to be coextensive with the scope of the privilege. In support of this contention, they rely on Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), the first case in which this Court considered a constitutional challenge to an immunity statute. The statute, a reenactment of the Immunity Act of 1868, [FN26] provided that no 'evidence obtained from a party or witness by means of a judicial ***450** proceeding . . . shall be given in evidence, or in any manner used against him . .. in any court of the United States . . .' [FN27] Notwithstanding a grant of immunity and order to testify under the revised 1868 Act, the witness, asserting his privilege against compulsory self-incrimination, refused to testify before a federal grand jury. He was consequently adjudged in contempt of court.[FN28] On appeal, this Court con-

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strued the statute as affording a witness protection only against the use of the specific testimony compelled from him under the grant of immunity. This construction meant that the statute 'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him.'[FN29] Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege,[FN30] the witness' refusal to testify was held proper. In the course of its opinion, the Court made the following statement, on which petitioners heavily rely:

FN25. See Piccirillo v. New York, 400 U.S. 548, 91 S.Ct. 520, 27 L.Ed.2d 596 (1971).

FN26. 15 Stat. 37.

FN27. See Counselman v. Hitchcock, supra, 142 U.S., at 560, 12 S.Ct., at 197.

FN28. In re Counselman, 44 F. 268 (CCND Ill. 1890).

FN29. Counselman v. Hitchcock, supra, 142 U.S., at 564, 12 S.Ct., at 198-199.

FN30. Precisely, the Court held 'that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply (sic) one, at least unless it is so broad as to have the same extent in scope and effect.' Id., at 585, 12 S.Ct., at 206. See Murphy v. Waterfront Comm'n, supra, 378 U.S., at 54, 78, 81 S.Ct., at 1596, 1609.

'We are clearly of opinion that no statute which leaves the party or witness**1660 subject to prosecution *451 after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. (The immunity statute under consideration) does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.' 142 U.S., at 585-586, 12 S.Ct., at 206.

Sixteen days after the Counselman decision, a new immunity bill was introduced by Senator Cullom,[FN31] who urged that enforcement of the Interstate Commerce Act would be impossible in the absence of an effective immunity statute.[FN32] The bill, which became the Compulsory Testimony Act of 1893,[FN33] was drafted specifically to meet the broad language in Counselman set forth above.[FN34] The new Act removed the privilege against self-incrimination in hearings before the Interstate Commerce Commission and provided that:

FN31. Counselman was decided Jan. 11, 1892. Senator Cullom introduced the new bill on Jan. 27, 1892. 23 Cong.Rec. 573.

FN32. 23 Cong.Rec. 6333.

FN33. Act of February 11, 1893, 27 Stat. 443, repealed by the Organized Crime Control Act of 1970, Pub.L.No. 91-452, s 245, 84 Stat. 931.

FN34. See the remarks of Senator Cullom, 23 Cong.Rec. 573, 6333, and Congressman Wise, who introduced the bill in the House. 24 Cong.Rec. 503. See Shapiro v. United States, 335 U.S. 1, 28-29 and n. 36, 68 S.Ct. 1375, 1389-1390, 92 L.Ed. 1787 (1948).

'no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any trans-

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action, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . .' Act of Feb. 11, 1893, 27 Stat. 444.

***452** This transactional immunity statute became the basic form for the numerous federal immunity statutes[FN35] until 1970, when, after re-examining applicable constitutional principles and the adequacy of existing law, Congress enacted the statute here under consideration.[FN36] The ****1661** new statute, which does not 'afford (the) absolute immunity against future prosecution' referred to in Counselman, was drafted to meet what Congress judged to be the conceptual basis of Counselman, as elaborated in subsequent decisions of the Court, namely, that immunity from the ***453** use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.[FN37]

FN35. Ullmann v. United States, 350 U.S., at 438, 76 S.Ct., at 506; Shapiro v. United States, supra, 335 U.S., at 6, 68 S.Ct., at 1378. There was one minor exception. See Piccirillo v. New York, 400 U.S., at 571 and n. 11, 91 S.Ct., at 532 (Brennan, J., dissenting); Arndstein v. McCarthy, 254 U.S. 71, 73, 41 S.Ct. 26, 27, 65 L.Ed. 138 (1920).

FN36. The statute is a product of careful study and consideration by the National Commission on Reform of Federal Criminal Laws, as well as by Congress. The Commission recommended legislation to reform the federal immunity laws. The recommendation served as the model for this statute. In commenting on its proposal in a special report to the President, the Commission said:

'We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers.' Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission, 1446 (1970).

The Commission's recommendation was based in large part on a comprehensive study of immunity and the relevant decisions of this Court prepared for the Commission by Prof. Robert G. Dixon, Jr., of the George Washington University Law Center, and transmitted to the President with the recommendations of the Commission. See National Commission on Reform of Federal Criminal Laws, Working Papers, 1405-1444 (1970).

FN37. See S.Rep.No.91-617, pp. 51-56, 145 (1969); H.R.Rep.No.91-1549, p. 42 (1970).

[5] The statute's explicit proscription of the use in any criminal case of 'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)' is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been

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construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'"[FN38] Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

FN38. Ullmann v. United States, 350 U.S., at 438-439, 76 S.Ct., at 507, quoting Boyd v. United States, 116 U.S., at 634, 6 S.Ct., at 534. See Knapp v. Schweitzer, 357 U.S. 371, 380, 78 S.Ct. 1302, 1308, 2 L.Ed.2d 1393 (1958).

[6] Our holding is consistent with the conceptual basis of Counselman. The Counselman statute, as construed by the Court, was plainly deficient in its failure to ***454** prohibit the use against the immunized witness of evidence derived from his compelled testimony. The Court repeatedly emphasized this deficiency, noting that the statute:

'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . .' 142 U.S., at 564, 12 S.Ct., at 198-199;

that it:
'could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted,' ibid.;

and that it:
'affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.' 142 U.S., at 586, 12 S.Ct., at 206.

The basis of the Court's decision was recognized in Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), in which the Court reiterated ****1662** that the Counselman statute was insufficient:
'because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony.' Id., at 437, 76 S.Ct., at 506. (Emphasis supplied.)

See also Arndstein v. McCarthy, 254 U.S. 71, 73, 41 S.Ct. 26, 27, 65 L.Ed. 138 (1920). The broad language in Counselman relied upon by petitioners***455** was unnecessary to the Court's decision, and cannot be considered binding authority.[FN39]

FN39. Cf. The Supreme Court, 1963 Term, 78 Harv.L.Rev. 179, 230 (1964). Language similar to the Counselman dictum can be found in Brown v. Walker, 161 U.S., at 594-595, 16 S.Ct., at 645-646, and Hale v. Henkel, 201 U.S., at 67, 26 S.Ct., at 376. Brown and Hale, however, involved statutes that were clearly sufficient to supplant the privilege against self-incrimination, as they provided full immunity from prosecution 'for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence . . .' 161 U.S., at 594, 16 S.Ct., at 645; 201 U.S., at 66, 26 S.Ct., at 375. The same is true of Smith v. United States, 337 U.S. 137, 141, 146, 69 S.Ct. 1000, 1002, 1005, 93 L.Ed. 1264 (1949), and United States v. Monia, 317 U.S. 424, 425, 428, 63 S.Ct. 409, 410, 411, 87 L.Ed. 376 (1943). In Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965),

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some of the Counselman language urged upon us by petitioners was again quoted. But Albertson, like Counselman, involved an immunity statute that was held insufficient for failure to prohibit the use of evidence derived from compelled admissions and the use of compelled admissions as an 'investigatory lead.' Id., at 80, 86 S.Ct., at 199.

In Adams v. Maryland, 347 U.S. 179, 182, 74 S.Ct. 442, 445, 98 L.Ed. 608 (1954), and in United States v. Murdock, 284 U.S. 141, 149, 52 S.Ct. 63, 64, 76 L.Ed. 210 (1931), the Counselman dictum was referred to as the principle of Counselman. The references were in the context of ancillary points not essential to the decisions of the Court. The Adams Court did note, however, that the Fifth Amendment privilege prohibits the 'use' of compelled self-incriminatory testimony. 347 U.S., at 181, 74 S.Ct., at 445. In any event, the Court in Ullmann v. United States, 350 U.S., at 436-437, 76 S.Ct., at 505-506, recognized that the rationale of Counselman was that the Counselman statute was insufficient for failure to prohibit the use of evidence derived from compelled testimony. See also Arndstein v. McCarthy, 254 U.S., at 73, 41 S.Ct., at 27.

In Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), the Court carefully considered immunity from use of compelled testimony and evidence derived therefrom. The Murphy petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor. After refusing to answer certain questions on the ground that the answers might tend to incriminate them, petitioners were granted immunity***456** from prosecution under the laws of New Jersey and New York. [FN40] They continued to refuse to testify, however, on the ground that their answers might tend to incriminate them under federal law, to which the immunity did not purport to extend. They were adjudged in civil contempt, and that judgment was affirmed by the New Jersey Supreme Court.[FN41]

FN40. The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact approved by Congress. 67 Stat. 541.

FN41. In re Application of Waterfront Comm'n of N. Y. Harbor, 39 N.J. 436, 189 A.2d 36 (1963).

The issue before the Court in Murphy was whether New Jersey and New York could compel the witnesses, whom these States had immunized from prosecution under their laws, to give testimony that might then be used to convict them of a federal crime. Since New Jersey and New York had not purported to confer immunity from federal prosecution, the Court was faced with the question what ****1663** limitations the Fifth Amendment privilege imposed on the prosecutorial powers of the Federal Government, a nonimmunizing sovereign. After undertaking an examination of the policies and purposes of the privilege, the Court overturned the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.[FN42] The Court held that the privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrimination***457** under state as well as federal law. Applying this principle to the state immunity legislation before it, the Court held the constitutional rule to be that:

FN42. Reconsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony that could be used to convict him in another jurisdiction was made necessary by the decision in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), in

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which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment. Murphy v. Waterfront Comm'n, 378 U.S., at 57, 84 S.Ct., at 1597.

'(A) state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Government in investigating and prosecuting crime, the Federal Governments must be prohibited from making any such use of compelled testimony and its fruits.' [FN43] 378 U.S., at 79, 84 S.Ct., at 1609.

FN43. At this point the Court added the following note: 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' Id., at 79 n. 18, 84 S.Ct., at 1609. If transactional immunity had been deemed to be the 'constitutional rule' there could be no federal prosecu- tion.'

The Court emphasized that this rule left the state witness and the Federal Government, against which the witness had immunity only from the use of the compelled testimony and evidence derived therefrom, 'in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.' Id., at 79, 84 S.Ct., at 1610.

It is true that in Murphy the Court was not presented with the precise question presented by this case, whether a jurisdiction seeking to compel testimony may do so by granting only use and derivative-use immunity, for New Jersey and New York had granted petitioners transactional immunity. The Court heretofore has not ***458** squarely confronted this question,[FN44] because post-Counselman immunity statutes reaching the Court either have followed the pattern of the 1893 Act in providing transactional immunity,[FN45] or have been found deficient for failure to prohibit the use of all evidence derived from compelled testimony. ****1664** [FN46] But both the reasoning of the Court in Murphy and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. Since the privilege is fully applicable and its scope is the same whether invoked in a state or in a federal jurisdiction, [FN47] the Murphy conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege. As the Murphy Court noted, immunity from use and derivative use 'leaves the witness and the Federal Government in substantially the same position ***459** as if the witness had claimed his privilege'[FN48] in the absence of a grant of immunity. The Murphy Court was concerned solely with the danger of incrimination under federal law, and held that immunity from use and derivative use was sufficient to displace the danger. This protection coextensive with the privilege is the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.[FN49]

FN44. See, e.g., California v. Byers, 402 U.S. 424, 442, n. 3, 91 S.Ct. 1535, 1545, 29 L.Ed.2d 9 (1971) (Harlan, J., concurring in judgment); United States v. Freed, 401 U.S. 601, 606 n. 11, 91 S.Ct. 1112, 1116, 28 L.Ed.2d 356 (1971); Piccirillo v. New York, 400 U.S. 548, 91 S.Ct. 520, 27 L.Ed.2d 596 (1971); Stevens v. Marks, 383 U.S. 234, 244-245, 86 S.Ct. 788, 793-794 (1966).

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FN45. E.g., Murphy v. Waterfront Comm'n, supra; Ullmann v. United States, supra; Smith v. United States, 337 U.S. 137, 69 S.Ct. 1000, 93 L.Ed. 1264 (1949); United States v. Monia, 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376 (1943); Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); Jack v. Kansas, 199 U.S. 372, 26 S.Ct. 73, 50 L.Ed. 234 (1905); Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896). See also n. 35, supra.

FN46. E.g., Albertson v. Subversive Activities Control Board, 382 U.S., at 80, 86 S.Ct., at 199; Arndstein v. McCarthy, 254 U.S., at 73, 41 S.Ct., at 27.

FN47. In Malloy v. Hogan, 378 U.S., at 10-11, 84 S.Ct., at 1494-1495 the Court held that the same standards would determine the extent or scope of the privilege in state and in federal proceedings, because the same substantive guarantee of the Bill of Rights is involved. The Murphy Court emphasized that the scope of the privilege is the same in state and in federal proceedings. Murphy v. Waterfront Comm'n, 378 U.S., at 79, 84 S.Ct., at 1609-1610.

FN48. Ibid.

FN49. As the Court noted in Gardner v. Broderick, 392 U.S., at 276, 88 S.Ct., at 1915, '(a)nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.'

IV

Although an analysis of prior decisions and the purpose of the Fifth Amendment privilege indicates that use and derivative-use immunity is coextensive with the privilege, we must consider additional arguments advanced by petitioners against the sufficiency of such immunity. We start from the premise, repeatedly affirmed by this Court, that an appropriately broad immunity grant is compatible with the Constitution.

Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

This argument presupposes that the statute's prohibition***460** will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom:

'(N)o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . .' 18 U.S.C. s 6002.

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory****1665** lead,'[FN50] and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

FN50. See, e.g., Albertson v. Subversive Activities Control Board, 382 U.S., at 80, 86 S.Ct., at 199.

[7] A person accorded this immunity under 18 U.S.C. s 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon

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the integrity and good faith of the prosecuting authorities. As stated in Murphy:

'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' 378 U.S., at 79 n. 18, 84 S.Ct., at 1609.

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

***461** This is very substantial protection,[FN51] commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testiony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.

FN51. See Murphy v. Waterfront Comm'n, 378 U.S., at 102-104, 84 S.Ct., at 1615-1617 (White, J., concurring).

The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions.[FN52] A coerced confession, as revealing of leads as testimony given in exchange for immunity,[FN53] is inadmissible in a criminal trial, but it does not bar prosecution.[FN54] Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from ***462** legitimate independent sources. [FN55] On the other hand, a defendant raising a coerced-confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible.[FN56]

FN52. Adams v. Maryland, 347 U.S., at 181, 74 S.Ct., at 444; Bram v. United States, 168 U.S. 532, 542, 18 S.Ct. 183, 186, 42 L.Ed. 568 (1897).

FN53. As Mr. Justice White, concurring in Murphy, pointed out:

'A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. Malloy v. Hogan (378 U.S. 1, 7-8, 84 S.Ct. 1489, at 1493-1494, 12 L.Ed.2d 653); Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265; Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568.' 378 U.S., at 103, 84 S.Ct., at 1616.

FN54. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

FN55. See supra, at 1664; Brief the United States 37; Cf. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

FN56. Jackson v. Denno, supra.

****1666** There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled

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in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.

We conclude that the immunity provided by 18 U.S.C. s 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. The judgment of the Court of Appeals for the Ninth Circuit accordingly is

Affirmed.

Mr. Justice BRENNAN and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, dissenting.

The Self-Incrimination Clause says: 'No person . . . shall be compelled in any criminal case to be a witness against himself.' I see no answer to the proposition that he is such a witness when only 'use' immunity is granted.

My views on the question of the scope of immunity that is necessary to force a witness to give up his guarantee***463** against self-incrimination contained in the Fifth Amendment are so well known, see Ullmann v. United States, 350 U.S. 422, 440, 76 S.Ct. 497, 507, 100 L.Ed. 51 (dissenting), and Piccirillo v. New York, 400 U.S. 548, 549, 91 S.Ct. 520, 521, 27 L.Ed.2d 596 (dissenting), that I need not write at length.

In Counselman v. Hitchcock, 142 U.S. 547, 586, 12 S.Ct. 195, 206, 35 L.Ed. 1110, the Court adopted the transactional immunity test: 'In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.' Id., at 586, 12 S.Ct., at 206. In Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819, a case involving another federal prosecution, the immunity statute provided that the witness would be protected 'on account of any transaction . . . concerning which he may testify.' Id., at 594, 16 S.Ct., at 645. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to testify, a ruling that made 'transactional immunity' part of the fabric of our constitutional law. Ullmann v. United States, supra, 350 U.S., at 438, 76 S.Ct., at 50.

This Court, however, apparently believes that Counselman and its progeny were overruled sub silentio in Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678, Murphy involved state witnesses, granted transactional immunity under state law, who refused to testify for fear of subsequent federal prosecution. We held that the testimony in question could be compelled, but that the Federal Government would be barred from using any of the testimony, or its fruits, in a subsequent federal prosecution.

Murphy overruled, not Counselman, but Feldman v. United States, 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408, which had held 'that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.' Murphy v. Waterfront Comm'n, supra, 378 U.S., at 77, 84 S.Ct., at 1608. But Counselman, ***464** as the Murphy Court recognized, 'said nothing about the problem of incrimination under the law of another sovereign.' Id., at 72, 84 S.Ct., at 1606. That problem is one of federalism, as to require transactional immunity between jurisdictions might

'deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity (a result which) would be gravely in derogation of its sovereignty and obstructive of its administration****1667** of justice.' United States ex rel. Catena v. Elias, 449 F.2d 40, 44 (CA3 1971).

Moreover, as Mr. Justice Brennan has pointed out, the threat of future prosecution

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Supreme Court of the United States
Charles Joseph KASTIGAR and Michael Gorean Stewart, Petitioners,
v.
UNITED STATES.
No. 70-117.

Argued Jan. 11, 1972.
Decided May 22, 1972.
Rehearing Denied June 26, 1972.

See 408 U.S. 931, 92 S.Ct. 2478.

Petitioners were ordered to appear before a grand jury and to answer questions under grantof immunity and, on refusal of the petitioners to answer questions, after asserting their privilege against compulsory self-incrimination, the United States District Court for the Central District of California adjudged petitioners to be in civil contempt and ordered them confined. The Court of Appeals, Ninth Circuit, affirmed, 440 F.2d 954. The Supreme Court granted certiorari, and, speaking through Mr. Justice Powell, held that although a grant of immunity must afford protection commensurate with that afforded by the privilege against compulsory self-incrimination, it need not be broader, and immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over claim of privilege. The Court also held that in any subsequent criminal prosecution of a person who has been granted immunity to testify, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of compelled testimony.

Affirmed.

Mr. Justice Douglas and Mr. Justice Marshall dissented and filed opinions.

Mr. Justice Brennan and Mr. Justice Rehnquist took no part in consideration or decision.

West Headnotes

[1] Criminal Law 110 ⚷393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In General. Most Cited Cases
Fifth Amendment privilege against compulsory self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. U.S.C.A.Const. Amend. 5.

[2] Criminal Law 110 ⚷393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In General. Most Cited Cases
Fifth Amendment privilege against compulsory self-incrimination protects against any disclosures which witness reasonably believes could be used in criminal prosecution or could lead to other evidence which might be so used. U.S.C.A.Const. Amend. 5.

[3] Criminal Law 110 ⚷393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In General. Most Cited Cases
Fifth Amendment privilege against compulsory self-incrimination does not deprive Congress of power to enact properly drawn laws that compel self-incrimination through grant of immunity from prosecution. U.S.C.A.Const. Amends. 5, 6; 18

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U.S. Department of Justice

United States Attorney
Southern District of Iowa

Criminal Division

U.S. Courthouse Annex, Suite 286
110 East Court Avenue
Des Moines, Iowa 50309-2053

(515) 473-9300
FAX (515) 473-9292

July 22, 2009

Dean Stowers
West Glen Town Center
The Hub Building, Suite 130
650 South Prairie View Drive
West Des Moines, Iowa 50266

Re: Proffer of [redacted]

Dear Mr. Stowers:

You have indicated that your client is willing to provide information to the government which may be of assistance to law enforcement in the Southern District of Iowa. This letter sets forth the ground rules covering any proffer of information by your client to the government.

1. **Purpose**: The purpose of your client making a proffer is to provide the government with an opportunity to assess the value, extent, and truthfulness of your client's information about potential criminal activity in the Southern District of Iowa and elsewhere; and/or to determine whether a plea agreement can be reached to address the charges now pending against your client.

2. **Truth**: Your client's proffer must be completely truthful with no material misstatements or omissions of fact.

3. **Recording**: At the government's option, the proffer interview may be tape-recorded, videotaped, or recorded through an agent's or government attorney's handwritten notes.

4. **Polygraph**: If requested by the government, your client agrees to submit to polygraph examinations by a polygraph examiner selected by the government.

5. **No Promises**: While your client hopes to receive some benefit by cooperating with the government, your client understands that the government is making no promise or assurances other than as set forth in this letter.

6. **No Direct Use**: The government agrees that statements or information contained in your client's proffer may not be used in the government's case-in-chief against your client

should a trial be held.

7. **Impeachment**: If your client should testify materially contrary to the substance of the proffer, or otherwise present in an legal proceeding a position materially inconsistent with the proffer, the proffer may be used against your client as impeachment or rebuttal evidence, or as the basis for a prosecution for perjury or false statement.

8. **Derivative Use**: The government may make derivative use of, and may pursue investigative leads suggested by, any statements or information provided by your client's proffer. This provision is necessary to eliminate the necessity of a Kastigar [1] hearing wherein the government would have had to prove that the evidence it sought to introduce at trial or in a related legal proceeding is derived from "a legitimate source wholly independent" of statements or information from the proffer.

9. **Crimes of Violence and Subsequent Criminal Conduct**: The government may make use of any statements or information provided by your client's proffer, without limitation, in any prosecution or investigation concerning any crime of violence or any crime that occurs after the date of this letter.

10. **Sentencing Information**: Your client understands that if your client either pleads guilty or is convicted at trial, the government, pursuant to 18 U.S.C. § 3661, must provide to the client's sentencing judge the contents of the proffer. Pursuant to U.S.S.G. § 1B1.8, however, the proffer may not be used to determine the appropriate guideline sentence, except as stated in the "Impeachment" paragraph above.

11. **Brady Discovery**: Your client understands that Brady v. Maryland[2] and its progeny require that the government provide any other indicted defendant all information known to the government which tends to mitigate or negate such defendant's guilt. Should your client's proffer contain Brady material, the government will be required to disclose this information to the appropriate defendant(s).

12. **Other Statements**: The terms of this agreement do not apply to any other statement made by your client at any other time, including any statements previously made to law enforcement.

---

[1] *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

13. **Scope**: This agreement is between your client and the United States Attorney's Office for the Southern District of Iowa, and it does not bind any other federal, state, or local authority. However, the government agrees that it will not disclose information provided by your client pursuant to this agreement to other law enforcement authorities for the purpose of prosecuting your client unless those authorities agree to be bound by the limitations set forth in this agreement.

14. **Full Agreement**: This document constitutes the full and complete agreement of the parties. It applies only to the proffer session that will be scheduled for . It will not apply to any other interview or legal proceeding unless specifically agreed by the government in writing.

Very truly yours,

Matthew G. Whitaker
United States Attorney

By: Mary C. Luxa
Mary C . Luxa
Assistant United States Attorney

I have read this proffer agreement carefully and reviewed every part of it with my attorney. I understand and voluntarily agree to it.

8-4-09
Date

[redacted]
Defendant

I represent as legal counsel. I have carefully reviewed every part of this proffer agreement with my client. To my knowledge, the decision to make this proffer agreement is informed and voluntary.

8/4/09
Date

Dean Stowers
Dean Stowers
Attorney for Defendant

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7076, 102 Stat. 4406; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

ADVISORY COMMITTEE NOTES

1944 Adoption

1. This rule is substantially a restatement of existing law and practice, 18 U.S.C. § 564 (Standing mute); Fogus v. United States, 34 F.2d 97, C.C.A.4th, (duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of nolo contendere has always existed in the Federal courts. *Hudson v. United States*, 47 S.Ct. 127, 272 U.S. 451, 71 L.Ed. 347; *United States v. Norris*, 50 S.Ct. 424, 281 U.S. 619, 74 L.Ed. 1076. The use of the plea is recognized by the Probation Act, 18 U.S.C. former (now § 3651) 724. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

1966 Amendments

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States v. Diggs*, 304 F.2d 929 (6th Cir.1962); *Domenica v. United States*, 292 F.2d 483 (1st Cir.1961); *Gundlach v. United States*, 262 F.2d 72 (4th Cir.1958), cert. den., 360 U.S. 904 (1959); and *Julian v. United States*, 236 F.2d 155 (6th Cir.1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks v. United States*, 298 F.2d 204 (5th Cir.1962); *Nunley v. United States*, 294 F.2d 579 (10th Cir.1961), cert. den., 368 U.S. 991 (1962); and *United States v. Von der Heide*, 169 F.Supp. 560 (D.D.C. 1959).

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948); *Kerchevel v. United States*, 274 U.S. 220, 223 (1927); *Munich v. United States*, 337 F.2d 356 (9th Cir.1964); *Pilkington v. United States*, 315 F.2d 204 (4th Cir.1963); *Smith v. United States*, 324 F.2d 436 (D.C.Cir.1963); but cf. *Marvel v. United States*, 335 F.2d 101 (5th Cir.1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich.Stat.Ann. § 28.1058 (1954); Mich.Sup. Ct.Rule 35A; *In re Valle*, 364 Mich. 471, 110 N.W.2d 673 (1961); *People v. Barrows*, 358 Mich. 267, 99 N.W.2d 347

§1B1.8. Use of Certain Information

(a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

(b) The provisions of subsection (a) shall not be applied to restrict the use of information:

(1) known to the government prior to entering into the cooperation agreement;

(2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);

(3) in a prosecution for perjury or giving a false statement;

(4) in the event there is a breach of the cooperation agreement by the defendant; or

(5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

Commentary

Application Notes:

1. *This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart downward on the basis of such information.*

2. *Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The Probation Service generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.*

3. *On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(e)(6) (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Rules of Evidence.*

4. *As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement.*

5. *This guideline limits the use of certain incriminating information furnished by a defendant in the context of a defendant-government agreement for the defendant to provide information concerning the unlawful activities of other persons. The guideline operates as a limitation on the use of such incriminating information in determining the applicable guideline range, and not merely as a restriction of the government's presentation of such information (e.g., where the defendant, subsequent to having entered into a cooperation agreement, provides such information to the probation officer preparing the presentence report, the use of such information remains protected by this section).*

6. *Unless the cooperation agreement relates to the provision of information concerning the unlawful activities of others, this guideline does not apply (i.e., an agreement by the defendant simply to detail the extent of his own unlawful activities, not involving an agreement to provide information concerning the unlawful activity of another person, is not covered by this guideline).*

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 5). Amended effective November 1, 1990 (see Appendix C, amendment 308); November 1, 1991 (see Appendix C, amendment 390); November 1, 1992 (see Appendix C, amendment 441); November 1, 2004 (see Appendix C, amendment 674).

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933; Pub.L. 94-149, § 1(9), Dec. 12, 1975, 89 Stat. 805; Apr. 30, 1979, eff. Dec. 1, 1980.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People v. Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e. avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. *General Electric Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir.1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir.1963), cert. denied 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659; *Armco Steel Corp. v. North Dakota*, 376 F.2d 206 (8th Cir.1967); *City of Burbank v. General Electric Co.*, 329 F.2d 825 (9th Cir.1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543.

"Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also *People v. Hamilton*, 60 Cal.2d 105, 32 Cal.Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discus-

sion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

1974 Enactment

The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of nolo contendere. See 15 U.S.C. 16(a). The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted. House Report No. 93–650.

As adopted by the House, rule 410 would make inadmissible pleas of guilty or nolo contendere subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendant would be able to contradict his previous statements and thereby lie with impunity [See *Harris v. New York*, 401 U.S. 222 (1971)]. To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions. Senate Report No. 93–1277.

The House bill provides that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed Rule 11(e)(6) of the Federal Rules of Criminal Procedure presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or nolo contendere, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and nolo contendere pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during Congressional consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions. House Report No. 93–1597.

1979 Amendments

Present rule 410 conforms to rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence: see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.

HISTORICAL NOTES

References in Text

Rule 11 of the Federal Rules of Criminal Procedure, referred to in par. (3), is classified to Title 18, Federal Rules of Criminal Procedure.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927, and amended Pub.L. 103-322, Title XXXIII, § 330013(4), Sept. 13, 1994, 108 Stat. 2146.)

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927, and amended Pub.L. 100-690, Title VII, § 7020(e), Nov. 18, 1988, 102 Stat. 4396; Pub.L. 103-322, Title XXXIII, § 330013(4), Sept. 13, 1994, 108 Stat. 2146.)

DETENTION HEARINGS

PRESENTED BY

BOB WICHSER,
MIKE SMART,
ASSISTANT
FEDERAL PUBLIC DEFENDERS

DETENTION HEARINGS AND THE BAIL REFORM ACT OF 1984

Robert A. Wichser
Michael L. Smart
Assistant Federal Public Defenders
Federal Criminal Law and Procedure – Fall 2009

November 19, 2009

This paper presents an outline overview of the issues involved in the setting – or more often denial – of bail and release from custody. These issues include: options for a judge in setting conditions of release, temporary detention and detention hearing procedures, and release pending sentencing and appeal.

When explaining the purpose of the Bail Reform Act of 1966, Congress stated:

> The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

Pub. L. 89-465. Times have certainly changed. The Bail Reform Act of 1984 gave the executive and judiciary unprecedented power to restrict the liberty of presumptively innocent persons without shouldering the evidentiary burden of proof beyond a reasonable doubt.

I. NATURE OF RIGHT TO BE RELEASED PRETRIAL

See US v. Salerno, 481 U.S. 739 (1987).

II. PURPOSE OF THE ACT

A. Primary purpose to de-emphasize use of money bonds and to provide flexible alternatives to judges setting high bail.

B. Act further intended to eliminate practice of detaining dangerous defendants by setting of high bail. 18 U.S.C. § 3142(c)(2).

C. Thus, the Act (18 U.S.C. § 3142(b)) expressly provides that a defendant shall be released on OR unless;

1. Defendant represents a serious flight risk; or

2. Defendant presents a danger to the community.

III. THE HIERARCHY OF RELEASE OPTIONS

A. Title 18 U.S.C. § 3142(a).

1. released on personal recognizance or on unsecured appearance bond;

a. Judicial officer shall order the release of the defendant on personal recognizance, or upon execution of an unsecured appearance bond, subject to condition that person no commit a federal, state, or local crime AND subject to condition of cooperation with DNA collection;

2. released with condition(s) attached;

b. If judicial officer finds that the person is a flight risk or danger to the community, he shall order release subject to conditions that person not commit a federal, state, or local crime AND cooperate with DNA collection AND others;

1) Except that in a case involving a minor victim (Title 18 U.S.C. §§ 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2251A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, 2425) or Title 18 U.S.C. 2250, mandatory minimum conditions of release apply (electronic monitoring, travel restrictions, associations, residence restrictions, avoidance of victim and witnesses, regular reporting, curfew, no guns and destructive devices).

3. temporary detention;

4. detention.

B. A crime of violence [as defined in Title 18 U.S.C. § 3156(a)(4)] or an offense listed in § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

1. A crime of violence.

a. An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another;

b. Any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or

c. Any felony under chapter 109A [sexual abuse – Title 18 U.S.C. §§ 2241-2248], chapter 110 [sexual exploitation and other abuse of children – Title 18 U.S.C. §§ 2251-2260] or chapter 117 [transportation for illegal sexual activity and related crimes – Title 18 U.S.C. §§ 2241-2427];

d. Note that there is some tension in the district courts about how to determine whether the offense is a crime of violence. What controls? The facts? Or the nature of the crime (categorical approach)? *United States v. Epps*, 987 F. Supp. (D.C.C. 1997) (facts); *United States v. Carter*, 996 F. Supp. 260 (W.D.N.Y. 1998) (categorical).

2. An offense listed in § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed.

   a. Added by Congress on December 17, 2004, presumably as a response to terrorism.

3. An offense for which the maximum sentence is life imprisonment or death;

4. A drug offense [21 U.S.C. § 801 et seq, 21 U.S.C. § 951 et seq., and 46 U.S.C. App. § 1901 et seq] for which the term of imprisonment of ten years or more is prescribed;

5. Any felony if the person has been convicted of two or more offenses described above or two or more state or local offenses that would be been offenses as described above had there existed federal jurisdiction;

6. Any felony that is not otherwise a crime of violence that involved a minor victim or involves the possession/use of a firearm or destructive device (see Title 18 U.S.C. § 921), or any other dangerous weapon, or involves a failure to register (registration of sex offenders under Title 18 U.S.C. § 2250); OR

7. A serious risk that such a person will flee; or

8. A serious risk that such person will obstruct/attempt to obstruct justice, or threaten/intimidate a prospective witness or juror.

B. Court's *Sua Sponte* Motion to Detain

1. The court can move to detain the defendant if the case involves:

a. A serious risk that such person will free; or

b. A serious risk that such person will obstruct/attempt to obstruct justice, or threaten/intimidate a prospective witness or juror.

C. If the Motion to Detain is Made by Either the Court or the Government, then . . .

1. The judicial officer shall hold a hearing to determine whether there is any condition or combination of conditions that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

D. The Detention Hearing

1. Shall be held immediately upon the person's *first* appearance before the court unless that person or the government seeks a continuance.

a. Government motion for continuance.

1) Cannot exceed three days, except for good cause.

b. Defendant's motion for continuance.

2) Cannot exceed five days, except for good cause.

c. Defendant remains incarcerated until the hearing.

d. During the continuance, court may order, on its own motion or on motion of the government, that defendant undergo medical examination to see if defendant is an addict. CAUTION: See USSG § 5H1.4. (Substance abuse is highly correlated to an increased propensity to commit crime.)

e. Defendant has these rights:

1) right to counsel;

2) right to testify;

3) right to cross-examine;

A. Proper cross-examination can contradict testimony relevant to the detention issue.

B. Use cross to explore the government's case (free discovery) and potentially lock-in a government agent's testimony. You are permitted to do this under § 3142(g)(2) (the weight of the evidence against the person).

C. You are entitled to any reports of that witness under Fed. R. Crim. P. 26.2 if:

1. Witness has authored a report and has signed it or has otherwise adopted or approved it;

2. Some recorded oral statement recorded contemporaneously with the oral statement and that is substantially verbatim;

3. A statement made to a grand jury, however taken or recorded.

4) right to present witnesses;

5) and right to provide other information by proffer or otherwise. This might be the best option because it essentially short circuits the government's cross examination and avoids the problems inherent in your client or client's family testifying at the hearing on the matter.

f. Rules of Evidence do not apply.

g. Standard of Proof: Clear and convincing evidence if there is a finding that there is no condition or combination of conditions that will reasonably assure the safety of any other person and the

community. The standard for flight risk is preponderance of the evidence.

h. The hearing may be re-opened if there is information that exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue of whether there is a condition or combination of conditions that will reasonably assure defendant's appearance and the safety of any other person and the community.

E. Detention Hearing Factors

1. In determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, the judicial officer **shall** take into account the available information concerning:

a. Nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

1) Did defendant accept responsibility for his/her offense early on?;

2) Has he/she cooperated with the government? Will his/her cooperation continue in the future? Is a legitimate governmental interest served by releasing defendant?;

A. But consider: What level of participant is he/she in the organization?

B. A truly informed participant might have more information than a simple mule. Is a medium level participant the kind of person the court will readily release?

C. What about tying 5K1.1 recommendation to satisfying pretrial conditions?

3) Defense counsel can make hay out of defendant's behavior when confronted by law enforcement authorities.

4) What about his/her level of cooperation with pretrial services officers?

5) What were some of the aggravating/mitigating factors?

6) Does the case involve something that might have an affirmative defense or any defense? Be careful not to show too much of your hand here, however.

b. Weight of the evidence against the person;

1) Read: FREE DISCOVERY WITHOUT HAVING TO SIT IN THE LITTLE ROOM AT THE USA'S OFFICE!!!

2) Also, take this as an opportunity to lock-in government witnesses.

3) Some defense counsel use the detention hearing to serve as the basis for exploring the totality of the government's case.

c. History and characteristics of the person;

1) Character.

A. This is a virtual bottomless pit of goodwill that your client has developed throughout his/her life, if applicable.

B. Comments relevant to defendant's character can include whether he/she was dishonest with pretrial services officers/cops/etc. However unfair, these statements may be seen by the judge as a glimpse into future compliance by the person.

C. Did defendant attempt to hide assets in the pretrial services interview?

2) Physical/mental condition.

A. Is there some kind of mental or physical ailment that defendant has that militates toward release? (i.e., is your client so sick that it would be costly for the Marshals to treat him/her while detained?)

B. Defense counsel might choose to show why pretrial release would lead to a more palatable alternative to detention re: medical or psychological condition.

3) Family ties.

A. This is perhaps one of the most important issues. Often, family are used to co-sign as well as to serve as third party custodians.

B. The ideal, instead, is for family members to rally around your client, without being enablers.

4) Employment.

A. It has always seemed odd to this writer that if the person had steady employment he/she most likely would not have engaged in conduct that is the subject of his/her current detention. But, ours is not the job to wonder why. Look at the steadiness or stability of your client's employment history.

B. Wanderlust is not your client's best friend. Show connectivity or anchoring of some sort to his/her community, family, city, etc.

C. If your client is unemployed at the time of the detention hearing, try to see if a former or prospective employer will sign an affidavit that offers employment to your client if released on conditions.

5) Financial resources.

6) Length of residence in community.

A. Look at roots that the person has planted in the community where he/she will be released. Is it the same community where the court presides?

B. Some courts take issue with having the pretrial releasee supervised by some other pretrial services officer in some other part of the United States. Be mindful of this regional squabble.

C. To the extent possible, try to show that your client has strong ties to his/her community. Of course, if he/she has committed the offense, his/her ties were apparently not strong enough to keep him/her from offending, but his/her guilt or innocence is not at issue right now. What is at issue is whether he/she is stable enough to stay put, not flee, and not be a danger to the community.

7) Community ties.

A. Civil involvement.

B. Church.

C. Community service.

D. As a practitioner, I would be careful not to over-emphasize some of these associations. For example, in a child porn case, the fact that your client is committed to his Boy Scout troop is not a good fact.

E. Other groups and memberships.

8) Past conduct.

A. The sky's the limit. The Act already talks about criminal history, character, family an community ties, etc. So what does this past conduct refer to? Anything you want it to refer to. Talk about some of the good things your client has done. Try to find some recent good acts or works.

9) History of drug or alcohol abuse.

A. It might shed some proper light if the abuse was as a response to some traumatic event. In other words, see what is causing the abuse and maybe a condition can be affixed to address the psychological nature of the abuse.

B. Does the alcohol/drug abuse correlate to criminal or other negative behaviors?

10) Criminal history.

A. The ideal is no criminal history. But, that's not always the hand you are dealt.

11) Record of appearances at court proceedings.

A. Highlight how he/she has done on his/her promise to appear for court on other occasions.

B. Talk to his/her prior pretrial services officers. See what his/her rate of compliance was.

C. See if he/she self-surrendered for other sentences.

D. Was he/she summoned to his/her initial appearance or was a warrant served? If he/she was summoned, and he/she voluntarily surrendered to the summons, that shows a propensity to follow the court's rules. If a warrant issued for his/her arrest and he/she self-surrendered, this also goes a long way.

12) Whether a person was on release status for a federal, state, or local offense (probation, parole, bail pending trial, sentencing, appeal, or completion of sentence).

A. Unfortunately, if your client was on some sort of release status when the federal offense was committed, courts usually go crazy about his/her re-offending and label him/her, however unfortunate, as a continuing danger to the community.

d. Nature and seriousness of the danger posed to any person or community by person's release.

e. In considering whether to release someone under a property bond or surety bond, court can, *sua sponte*, or on motion of the government, conduct an inquiry into the source of the property to see if the source of the property will not reasonably assure appearance.

F. Those Pesky Little Presumptions (Two Classes).

1. In various circumstances, the playing field in which you and the government play is tilted ever so slightly towards the government. Now, anyone who has ever practiced in federal court knows that this "tilt" is more akin to an avalanche, but nonetheless, the tilt is supposed to be ever so slight. What are the circumstances under which the playing field begins tilted in favor of detention?

2. In a case described in Title 18 U.S.C. § 3142(f)(1), there exists a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judicial officer find that:

   a. The person has been convicted of an offense under (f)(1) (i.e., a crime of violence, an offense listed in § 2332b(g)(5)(B) for which a term of imprisonment of 10 years or more is prescribed, an offense with a life or death maximum, a drug offense where 10 years is a possible sentencing option, any state or local offense described in (f)(1) if there had been federal jurisdiction, and any felony that is not a crime of violence that involves a minor victim or involves the possession/use of a firearm or destructive device (see Title 18 U.S.C. § 921), or any other dangerous weapon, or involves a failure to register (registration of sex offenders under Title U.S.C. § 2250)), AND;

   b. The offense described in (f)(1) was committed while the person was released pending trial for a f/s/l offense; and

   c. Not more than five years has elapsed since the date of conviction or release for the offense in (f)(1), whichever is later.

3. Subject to rebuttal by the person, presumption exists that no condition or combination of conditions will reasonably assure person's appearance and the safety of the community if the judicial officer finds that there is probable cause to believe that the person has committed:

   a. A drug offense where the maximum term of imprisonment prescribed by statute is ten years or more; or

   b. An offense under Title 18 U.S.C. §924(c)[possession of a firearm during a crime of violence or drug trafficking crime];

   c. An offense under Title 18 U.S.C. §956(a)[conspiracy to kill, kidnap, aim, or injure persons or damage property in a foreign country];

d. An offense under Title 18 U.S.C. §2332b[An act of terrorism transcending national boundaries]; or

e. An offense involving a minor victim Title 18 U.S.C. §§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), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 [kidnapping, sex trafficking of children, sexual abuse, various child porn and sexual exploitation of children offenses]

4. The preliminary and detention hearings are usually held at the same time. Some defense attorneys waive the preliminary hearing and elect, instead, to fight the detention portion. Keep in mind that your waiver of the preliminary hearing kicks in the presumption in an applicable case because you are admitting that there is probable cause. It has always seemed wiser to me to not waive either hearing so that you don't constrain your ability to cross examine, and so that you don't unwittingly kick in the presumption in an applicable case yourself.

5. An indictment alone represents probable cause.

G. A WORD (or two) ABOUT REBUTTING THE PRESUMPTION

1. Oftentimes, judges rely too heavily on the presumption to detain our clients. Although they know that the presumption may be reubtted, they often see this rebuttal as impossible to overcome. This is simply not the case. If the presumption is invoked, the defendant then has the burden of production showing that he is not a flight risk or danger to the community.

a. Ways to rebut presumption

1) Use of proffer evidence from pretrial services report;
2) Good cross-examination of government witness, but be careful not to make government's point (i.e., eluding, evading arrest and detention issues, any use of dangerous instrumentalities);
3) Defendant's confession, if any;
4) Defendant's activities prior to arrest (i.e., no attempt to abscond, especially if indictment was forthcoming);
5) Self-surrender upon warrant of arrest;
6) The G Factors (18 USC § 3142(g)).

H. RELEASE OR DETENTION OF A DEFENDANT PENDING SENTENCING OR APPEAL – TITLE 18 U.S.C. §3143

1. PENDING SENTENCING.

a. The judge shall order that a person be detained if that person has been found guilty and is awaiting the imposition or execution of a sentence unless the guidelines don't recommend a sentence of imprisonment. Court can still release person if it finds by clear and convincing evidence that person is not likely to flee or pose a danger to community.

b. Once judicial officer finds lack of flight risk and non-danger by clear and convincing evidence, the court ***SHALL*** order release pursuant to Title 18 U.S.C. §3142(b)or (c).

c. If the person has been found guilty and is awaiting imposition or execution of a sentence for a 1) crime of violence, 2) an offense where the maximum is life imprisonment or death, or 3) a drug offense where the maximum by statute is ten years or more, the court shall order detention unless,

1) The court finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

2) An attorney for the government has recommended that no sentence of imprisonment be imposed;

And

3) The court finds by clear and convincing evidence that the person is not a flight risk and not a danger to the community.

2. RELEASE/DETENTION PENDING APPEAL BY DEFENDANT

a. For a person found guilty, assessed a term of imprisonment, and who has filed an appeal or petition for writ of certiorari, court shall detain such person unless the court finds,

1) By clear and convincing evidence, person is not a flight risk or a danger to the community if released under own recognizance, unsecured bond, or condition or combination of conditions;

And

2) That the appeal is not for delay and raises a substantial question of law or fact likely to result in a reversal, an order for new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the duration of the appeal process.

A. Court, if it makes the above findings, must release person, except that detention can be ordered terminated at point at which reduced sentence served.

b. If the person has been found guilty and has been assessed a term of imprisonment for a 1) crime of violence, 2) an offense where the maximum is life imprisonment or death, or 3) a drug offense where the maximum by statute is ten years or more, the court shall order detention.

c. Title 18 U.S.C. §3145(c) still allows a court to release a convicted defendant who has been assessed a term of imprisonment and ordered detained under Title 18 U.S.C. §3143(b)(2) if the person can show exceptional circumstances such as . . .

1) Aberrant criminal conduct, uncharacteristic reaction to an unusually provocative situation, failing health, length of sentence, lost benefit while incarcerated awaiting appeal, to name a few. *See United States v. Garcia,* 340 F.3d 1013, 1019-22 (9th Cir. 2003); *United States v. Jones,* 979 F.2d 804 (10th cir. 1992); *United States v. Herrera-Soto,* 961 F.2d 645 (7th cir. 1992); *United States v. DiSomma,* 951 F.2d 494 (2d Cir. 1991).

3. RELEASE/DETENTION PENDING APPEAL BY THE GOVERNMENT

a. Detention/release order in place is still in effect. If neither in effect, then 3142 to be followed. But if person is sentenced to a term of imprisonment, he shall be detained. In any other circumstance, release or detention is proper as dictated by 3142.

ETHICS

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[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

RULE 32:1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 32:1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 32:1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 32:1.8(b) and 32:1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See rule 32:1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Iowa Rules of Professional Conduct or other law. *See also* Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Permissive Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered in the near future or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in rule 32:1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. *See* rule 32:1.2(d). See also rule 32:1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and rule 32:1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining

from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified, or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Iowa Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes rule 32:1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by rule 32:1.4. If, however, the other law supersedes this rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by rule 32:1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who

might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). *See* rules 32:1.2(d), 32:4.1(b), 32:8.1, and 32:8.3. Rule 32:3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule. *See* rule 32:3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* rules 32:1.1, 32:5.1, and 32:5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. *See* rule 32:1.9(c)(2). See rule 32:1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Required Disclosure Adverse to Client

[19] Rule 32:1.6(c) requires a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm. Rule 32:1.6(c) differs from rule 32:1.6(b)(1) in that rule 32:1.6(b)(1) permits, but does not require, disclosure in situations where death or substantial bodily harm is deemed to be reasonably certain rather than imminent. For purposes of rule 32:1.6, "reasonably certain" includes situations where the lawyer knows or reasonably believes the harm will occur, but there is still time for independent discovery and prevention of the harm without the lawyer's disclosure. For purposes of this rule, death or substantial bodily harm is "imminent" if the lawyer knows or reasonably believes it is unlikely that the death or harm can be prevented unless the lawyer immediately discloses the information.

RULE 32:1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

May 25, 2008

26-Year Secret Kept Innocent Man In Prison

Lawyers Tell 60 Minutes They Were Legally Bound From Revealing Secret

Play CBS Video Lawyers Keep 26-Year Secret

Two lawyers tell Bob Simon about their decision to keep the secret that their client had committed a murder while an innocent man went to jail for the crime and remained there for 26 years.

Alton Logan **(CBS)**

(CBS) *This story was originally broadcast on March 9, 2008. It was updated on May 23, 2008.*

This is a story about an innocent man who languished in prison for 26 years while two attorneys who knew he was innocent stayed silent. As **correspondent Bob Simon** reported earlier this year, they did so because they felt they had no choice.

Alton Logan was convicted of killing a security guard at a McDonald's in Chicago in 1982. Police arrested him after a tip and got three eyewitnesses to identify him. Logan, his mother and brother all testified he was at home asleep when the murder occurred. But a jury found him guilty of first degree murder.

Now new evidence reveals that Logan did not commit that murder, something that was not new to those two attorneys, who knew it all along but say they couldn't speak out until now.

Alton Logan's story cuts to the core of America's justice system.

Simon met Alton Logan in prison, where he's spent almost half of his life.

Asked if he still counts the months and days, Logan told Simon, "There's no need to count the months and the days. Just count the years."

Logan said that during the first five or six years he was "consumed" by anger. "Then I come to the realization that 'Why be angry over something you can't control?'"

Logan, who maintains he didn't commit the murder, thought they were "crazy" when he was arrested for the crime.

Attorneys Dale Coventry and Jamie Kunz knew Logan had good reason to think that, because they knew he was innocent. And they knew that because their client, Andrew Wilson, who they were defending for killing two policemen, confessed to them that he had also killed the security guard at McDonald's - the crime Logan was charged with.

"We got information that Wilson was the guy and not Alton Logan. So we went over to the jail immediately almost and said, 'Is that true? Was that you?' And he said, 'Yep it was me,'" Kunz recalled.

"He just about hugged himself and smiled. I mean he was kind of gleeful about it. It was a very strange response," Kunz said, recalling how Wilson had reacted.

"How did you interpret that response?" Simon asked.

"That it was true and that he was tickled pink," Kunz said.

"He was pleased that the wrong guy had been charged. It was like a game and he'd gotten away with something. But there was just no doubt whatsoever that it was true. I mean I said, 'It was you with the shotgun-you killed the guy?' And he said, 'Yes,' and then he giggled," Coventry added.

The problem was the killer was their client. So, legally, they had to keep his secret even though an innocent man was about to be tried for murder.

"I know a lot of people who would say, 'Hey if the guy's innocent you've got to say so. You can't let him rot because of that,'" Simon remarked.

"Well, the vast majority of the public apparently believes that, but if you check with attorneys or ethics committees or you know anybody who knows the rules of conduct for attorneys, it's very, very clear-it's not morally clear-but we're in a position to where we have to maintain client confidentiality, just as a priest would or a doctor would. It's just a requirement of the law. The system wouldn't work without it," Coventry explained.

So that was the dilemma. They couldn't speak out, they felt, but how could they remain silent?

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Alton Logan **(CBS)**

(CBS) Asked if they contemplated doing something about it, Coventry told Simon, "We wrote out an affidavit. We made an affidavit that we had gotten information through privileged sources, that Alton Logan was not in fact guilty of killing the officer, that in fact somebody else did it."

"We wanted to put in writing, to memorialize, you know, to get a notarized record of the fact that we had this information back then so that if, you know, 20 years later, 10 years later, if something allowed us to talk, as we are now, we could at least we we'd at least have an answer to someone who says, 'You're just making this up now,'" Kunz added.

They sealed the affidavit in an envelope and put the envelope in a lockbox to keep it safe under Coventry's bed.

While the attorneys kept silent about Logan's innocence, a jury convicted him of murder. Then the jurors had to decide whether to sentence him to death.

"I was in court the day they were dealing with the death penalty," Coventry recalled.

Asked why he went to court, he told Simon, "'Cause I had this information that this innocent guy was up there and the jury was deciding whether they're gonna kill him or not."

Coventry said his heart was racing when he went into the courtroom. "It was just creepy. Knowing I was looking at the jurors thinking, 'My God, they're going to decide to kill the wrong guy.'"

In the end, the jurors spared Logan's life.

"It was a 10 to 2 vote. Ten for, two against. Two individuals saved my life," Logan explained.

And the jurors saved Kunz and Coventry from coming forward. "We thought that somehow we would stop at least the execution. We weren't gonna let that go," Coventry told Simon.

"But instead he was sentenced to life in prison, and you did not do anything?" Simon asked.

"Right," Kunz said.

"So it's just okay to prevent his execution if necessary, but it was not okay to prevent his going to prison for the rest of his life?" Simon asked.

"Morally there's very little difference and were torn about that, but in terms of the canons of ethics, there is a difference, you can

prevent a death," Coventry replied.

"But the minute he was not sentenced to death, the minute he was sentenced to life in prison, you decided to do nothing?" Simon asked.

"Yes," Kunz said. "I can't explain it. I don't know why that made the difference but I know it did."

"There is no difference between life in prison and a death penalty. None whatsoever. Both are a sentence of death," Logan told Simon.

Logan said while he could sympathize with the attorneys' problem of not being able to speak up, he couldn't understand it. "'Cause if you know this is an innocent person, why would you allow this person to be prosecuted, convicted, sent to prison for all these years?" he asked.

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Alton Logan **(CBS)**

(CBS) "What did you do to see if there might be some loophole to get everyone out of this fix?" Simon asked the attorneys.

"I researched the ethics of attorney-client privilege as much as I could. I contacted people who are involved in making those determinations. I know Jamie did the same thing," Coventry said.

"I could not figure out a way, and still cannot figure out a way, how we could have done anything to help Alton Logan that would not have put Andrew Wilson in jeopardy of another capital case," Kunz added.

"Couldn't you have leaked it to somebody? To a reporter, to an administrator, to the governor, to somebody?" Simon asked.

"The only thing we could have leaked is that Andrew Wilson confessed to us. And how could we leak that to anybody without putting him in jeopardy?" Kunz replied. "It may cause us to lose some sleep. But, but I lose more sleep if I put Andrew Wilson's neck in the in the noose."

"He was guilty and Logan was not. So, yes his head should be in the noose. And Logan should go free. It's perfectly obvious to somebody who isn't a lawyer," Simon pointed out. "Andrew Wilson was guilty, was he not?"

"Yes. And that's up to the system to decide. It's not up to me as his lawyer to decide that he was guilty and so he should be punished and Logan should go free," Kunz said.

"Do you think you might have been disbarred for doing that, for violating attorney-client privilege?" Simon asked.

"I don't think I considered that as much as I considered my responsibility to my client. I was very concerned to protect him," Coventry explained.

"But here is a case where two men, you two were caught up in this bind. And chose to let a man rot away in jail," Simon remarked.

"It seems that way. But had we come forward right away, aside from violating our own client's privilege, and putting him in jeopardy, would the information that we had have been valued? Would it have proved anything?" Coventry replied.

Probably not, they say, because as a violation of attorney-client privilege, it would never have been allowed in court. They insist that for them, there was no way out.

"In terms of my conscience, my conscience is that I did the right thing. Do I feel bad about Logan? Absolutely I feel bad about

Logan," Coventry admitted.

The attorneys say they were so tormented over Logan's imprisonment that they convinced Wilson to let them reveal that Wilson was the real killer after Wilson's death. Late last year, Wilson died. The two attorneys finally took their affidavit out of the lockbox, and they called Logan's lawyer, pubic defender Harold Winston.

Winston had already been trying to get Logan a new trial. He'd found two eyewitnesses who swore Logan was not the killer. Now, with Kunz and Coventry's affidavit, he thinks Logan will finally go free.

"I know the attorney general's office of Illinois is considering this. And I have a lot of respect for that office," Winston said. "And I'm hoping they will come to the right conclusion, that a mistake has been made. And if they do that, he would go free."

And even though Winston represents Alton Logan, he agrees the two attorneys had to remain silent until Wilson died. "I wish there had been a way this could have come out earlier. Under the…Illinois ethics code, I think the only way would have been if Andrew Wilson had released his lawyers earlier," he explained.

"There may be other attorneys who have similar secrets that they're keeping. I don't wanna be too defensive but what makes this case so different, is that Dale and I came forward. And that Dale had the good sense to talk to Wilson before his death. And get his permission. 'If you die, can we talk?' Without that, we wouldn't be here today," Kunz said.

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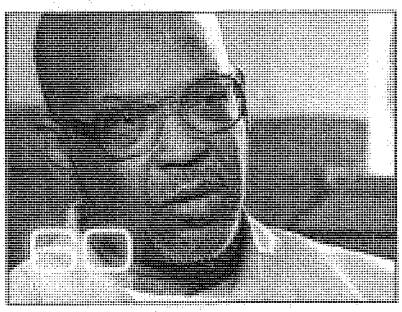

Alton Logan **(CBS)**

(CBS) "See, I never stopped giving up hope. I've always believed that one day is gone-somebody's gonna come forth and tell the truth. But I didn't know when," Logan told Simon.

Asked what they would say to him if they were able to visit Logan in his cell, one of the attorneys said, "There's nothing you can say. Well, it's been difficult for us. But there's no comparison what so ever to what it's been for this poor guy."

"How has it been difficult for them?" Logan inquired.

"Alton, whether or not you can understand it, we've been hurting for you for 26 years," Kunz said. "How often did I think about it? Probably 250 times a year. I mean I thought about it regularly."

"Everything that was dear to me is gone," Logan, who missed his mother's funeral, told Simon.

His brothers Eugene and Tony told ***60 Minutes*** they've shared Alton's pain, and they always knew that he was no killer. "My brother ain't got the nature to do nothin' like that in his soul. He ain't gonna take nobody else's life. We weren't raised like that," Tony said.

"Your brother is 54 now. Can he start again at the age of 54?" Simon asked.

"I think we gonna make it," Eugene said. "If he get from behind them bars, I'm gonna turn him back on to life. And we gonna live it together. We're gonna live it together."

But Alton Logan is still behind bars. "They are quick to convict but they are slow to correct they mistakes," he said.

"All I wanted was the truth. All I want is the truth," he said.

"And the truth shall set you free," Simon remarked.

"Yes it will," Logan said.

One month after this report had aired, the truth finally did set Alton Logan free. A judge, citing the new evidence, threw out his conviction and released Logan on just $1,000 bond. Illinois' attorney general will not appeal the ruling and is deciding whether to retry Alton or to simply drop the charges.

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Example of the comments posted to CBS News website article:

dtron454:

All throughout history there have been those who chose to do the morally correct thing instead of the legally correct thing. Even though they have suffered the consequences, what they have done for their societies cannot be measured and will not be forgotten. Names like Rosa Parks, Mahatma Gandhi, Martin Luther King, Nelson Mandela, the list goes on.

I hope the two lawyers who failed to do the right thing take the time to read these comments. You had your chance follow the moral path and make a difference. Instead you chose to slither under a rock and hide like scum.

anonymous:

How hard can it be to create a "cannon of ethics" for lawyers. Lie - lay your head down on your pillow at night and go on to be a politician. Apply those principals when you "represent" the people!! I cannot find language strong enough to describe these men. Spineless cowards.....despicable.....etc., etc. I am outraged.....the show took my breath away. We should all be scared to death knowing how our judicial system "works".....not!!

ericv2644:

Those lawyers should go to jail for conspiracy to lock up an innocent man for 26 years. They should not be able to hide behind the cannon of ethics. They have no ethics. Let them sit in jail and feel the pain of this man. They should be disbarred from the practice of law forever because they are exactly what is wrong with the Justice system. NO MORALS!

jem888:

Jamie Kunz and Dale Coventy are disgusting. There is a special place in hell reserved for these two along with Adolf Hitler.

construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'"[FN38] Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

FN38. Ullmann v. United States, 350 U.S., at 438-439, 76 S.Ct., at 507, quoting Boyd v. United States, 116 U.S., at 634, 6 S.Ct., at 534. See Knapp v. Schweitzer, 357 U.S. 371, 380, 78 S.Ct. 1302, 1308, 2 L.Ed.2d 1393 (1958).

[6] Our holding is consistent with the conceptual basis of Counselman. The Counselman statute, as construed by the Court, was plainly deficient in its failure to ***454** prohibit the use against the immunized witness of evidence derived from his compelled testimony. The Court repeatedly emphasized this deficiency, noting that the statute:

'could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . .' 142 U.S., at 564, 12 S.Ct., at 198-199;

that it:
'could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted,' ibid.;

and that it:
'affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party.' 142 U.S., at 586, 12 S.Ct., at 206.

The basis of the Court's decision was recognized in Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956), in which the Court reiterated ****1662** that the Counselman statute was insufficient:
'because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony.' Id., at 437, 76 S.Ct., at 506. (Emphasis supplied.)

See also Arndstein v. McCarthy, 254 U.S. 71, 73, 41 S.Ct. 26, 27, 65 L.Ed. 138 (1920). The broad language in Counselman relied upon by petitioners***455** was unnecessary to the Court's decision, and cannot be considered binding authority.[FN39]

FN39. Cf. The Supreme Court, 1963 Term, 78 Harv.L.Rev. 179, 230 (1964). Language similar to the Counselman dictum can be found in Brown v. Walker, 161 U.S., at 594-595, 16 S.Ct., at 645-646, and Hale v. Henkel, 201 U.S., at 67, 26 S.Ct., at 376. Brown and Hale, however, involved statutes that were clearly sufficient to supplant the privilege against self-incrimination, as they provided full immunity from prosecution 'for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence . . .' 161 U.S., at 594, 16 S.Ct., at 645; 201 U.S., at 66, 26 S.Ct., at 375. The same is true of Smith v. United States, 337 U.S. 137, 141, 146, 69 S.Ct. 1000, 1002, 1005, 93 L.Ed. 1264 (1949), and United States v. Monia, 317 U.S. 424, 425, 428, 63 S.Ct. 409, 410, 411, 87 L.Ed. 376 (1943). In Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965),

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