PROGRAM

8:00 a.m. to 8:30 a.m.	**Registration**
8:30 a.m. to 9:00 a.m.	**Odds and Ends** *Nick Drees*, Federal Public Defender
9:00 a.m. to 10:30 a.m	**Forensic Issues in Meth Cases** *Gene Gietzen* Forensic Consulting Associates, L.L.C.
10:30 a.m. to 10:45 a.m.	**Break**
10:45 a.m. to 11:45 a.m.	**Supreme Court & Eighth Circuit Update** *John Messina, Research & Writing Attorney* Federal Public Defender's Office Des Moines, IA
11:45 a.m. to 1:00 p.m.	**Lunch (On your own)**
1:00 p.m. to 2:00 p.m.	**BOP Polices and Procedures** *Brad Roux* BOP Community Corrections Specialist *Jeff George* BOP Disciplinary Hearing Officer North Central Regional Office of the Federal Bureau of Prisons
2:00 p.m. to 3:00 p.m.	**The Claiborne Case** *Michael Dwyer* Assistant Federal Public Defender St. Louis, MO
3:00 p.m. to 3:15 p.m.	**Break**
3:15 p.m. to 4:15 p.m.	**Ethics - Panel Discussion** Dealing with Difficult Clients *Wendell J. Harms* Assistant Ethics Counsel Iowa Supreme Court Attorney Disciplinary Board *Nick Drees* Federal Public Defender *Tim Ross-Boon, James Whalen* Assistant Federal Public Defenders Des Moines, IA

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ODDS & ENDS

PRESENTED BY

NICK DREES
FEDERAL PUBLIC DEFENDER

Odds & Ends - Spring 2007

Presented by Nick Drees

Sexually Dangerous Persons - 18 USC § 4248

§ 4247. General provisions for chapter

(a) Definitions.--As used in this chapter– . . .

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

§ 4248. Civil commitment of a sexually dangerous person (emphasis added)

(a) Institution of proceedings.--*In relation to a person who is in the custody of the Bureau of Prisons*, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, *the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined.* The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. *The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.*

. . .

(d) Determination and disposition.– *If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General.* The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until--

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;

whichever is earlier.

Proposed Amendments to the Sentencing Guidelines - 2007

(Effective November 1, 2007, unless Congress takes action to the contrary)

1. §1B1.13 - Reduction in term of imprisonment based on motion by BOP Director
   A. 28 USC § 994(t) directed USSC to provide criteria to be applied and a list of examples to guide courts in granting sentencing reduction under 18 USC § 3582(c)(1)(A) upon motion of BOP director for "extraordinary and compelling reasons."
   B. 18 USC § 3582(c)(1)(A), says in part:
      (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment [of a person who is already serving a sentence] after considering the factors set forth in section 3553(a) . . . if it finds that--
      (i) extraordinary and compelling reasons warrant such a reduction.
   C. Amendment lists following "extraordinary and compelling reasons":
      (1) Δ suffers terminal illness
      (2) Δ suffers medical condition or deteriorating health due to aging that diminishes ability to care for self in prison, and conventional treatment offers no substantial improvement
      (3) death or incapacitation of Δ's only family member able to care for Δ's minor children
      (4) as determined by BOP director, some other extraordinary or compelling reason.
   D. Use these factors to argue for reduction at time of sentencing too.

2. Transportation - implements provisions of PATRIOT Reauthorization Act and Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)
   A. These acts created new offenses and increased penalties for others. The changes are incorporated into the guidelines through references in Appendix A and in the corresponding lists of statutory provisions in the following guidelines: murder, manslaughter, assault, obstructing officers, interference with flight crews, threatening communications, bribery, unlawful possession of nuclear materials, mishandling of toxic substances, and attempts.
   B. Expands scope of the chop shop enhancement (2 levels, minimum of 14) under §2B1.1(b)(11) to cover cargo thefts and receipt of stolen vehicles or goods.
   C. Adds "seaport" to the secured areas covered by trespass guideline, §2B2.3.

3. Terrorism - implements USA PATRIOT Reauthorization Act of 2005 and Homeland Security Appropriations Act of 2007.

A. Creates new guideline, §2D1.14 (Narco-Terrorism), to cover new narco-terrorism offense created at 21 USC § 960a, which prohibits engaging in any activity that would be illegal under 21 USC § 841(a) if committed in U.S. jurisdiction, while knowing or intending to provide, directly or indirectly anything of pecuniary value to a person or organization involved in terrorist activity. Statute doubles the mandatory minimum under 21 USC § 841(b)(1).
   (1) Base offense level same as §2D1.1
   (2) Excludes mitigating role cap in §2D1.1(a)(3)(A) and (B), and excludes safety valve.
   (3) Provides specific offense characteristic with 6-level increase if adjustment for terrorism in §3A1.4 does not apply. This doubles the minimum as directed in statute but avoids double counting with §3A1.4.

B. Creates new guideline, §2X7.1 (Border Tunnels and Subterranean Passages) to cover new statute, 18 USC § 554, regarding construction of border tunnels. In addition to prohibiting creation or financing of these tunnels or passages, new statute prohibits use of these structures to smuggle aliens, goods, drugs, weapons of mass destruction, or terrorists. Authorizes penalty of twice the maximum term that would have applied if conduct hadn't used tunnel.
   (1) Base offense level 16
   (2) Provides four level increase over base offense level of underlying smuggling offense if tunnel is used.
   (3) Base offense level 8 for offenses under 18 USC § 554(b), which prohibits knowing or reckless disregard for construction or use of tunnel on land defendant owns.

C. Attaches other new offenses to existing guidelines:
   (1) Smuggling goods from United States under 18 USC § 554 falls under guidelines for theft of cultural heritage resources, exportation of arms, munitions, etc., and offenses involving fish, wildlife, and plants.
   (2) Mining of US navigable waters under 28 USC § 2282A falls within murder, larceny, arson and attempt guidelines.
   (3) Violence against maritime navigational aids under 18 USC §2282B falls within fraud, arson, and attempt guidelines.
   (4) Transporting biological and chemical weapons under 18 USC § 2283 falls under guidelines for possession of explosives, providing material support for terrorism, and unlawful possession of nuclear materials.
   (5) Transporting terrorists under 18 USC §2284 falls under guideline for providing material support for terrorism.

D. USSG §2E4.1 (Unlawful conduct relating to contraband cigarettes) amended to conform to change in statute, which reduces number of contraband cigarettes needed to commit crime from 60,000 to 10,000. Also expands headings in

guidelines to include smokeless tobacco.

E. PATRIOT ACT increased maximum from 10 years to 20 for violation of International Emergency Economic Powers Act, 50 USC §1705. Amendment references this offense to the terrorism guideline, §2M5.3.

F. Implements directive in the Violence Against Women and DOJ Reauthorization Act of 2005 by creating new policy statement at §5K2.24, which provides that an upward departure may be warranted if Δ commits offense while wearing or displaying an official or counterfeit insignia or uniform in violation of 18 USC § 716, a misdemeanor offense related to badges, insignia, or uniforms of public agencies.

4. Sex Offenses - Implements Adam Walsh Child Protection and Safety Act of 2006.

A. Increases base offense level in USSG §2A3.1 (Criminal sexual abuse; attempt to commit criminal sexual abuse) from level 30 to level 38 to account for new mandatory minimum 30 years for aggravated sexual abuse of child under 12, or of child between 12 and 16 if force or threat used. Adds application note to preclude adjustments for age of victim and to avoid double counting if offense conduct involved force or threats.

B. The act increased statutory maximum for sexual abuse of person in official detention or under custodial authority from 5 to 15 years. Amendment increases base offense level in §2A3.3 (Criminal sexual abuse of ward or attempt to commit such act) from 12 to 14.

C. Addresses new offense for abusive sexual contact by increasing minimum offense level in the age enhancement of the abusive sexual contact guideline, §2A3.4, from level 20 to level 22.

D. Failure to register as a sex offender, 18 USC §2250(a).

(1) New guideline, §2A3.5, provides three alternative base offense levels (16, 14, and 12) depending on the tiered category of the Δ, that is, the nature of the Δ's underlying sex offense.

(2) Also provides tiered enhancements for crimes committed while in failure-to-register status: 6 levels for sex offense against an adult; 6 levels for felony against a minor; 8 levels for sex offense against a minor.

(3) 3-level decrease if Δ voluntarily corrected failure to register or tried to register but was prevented by uncontrollable circumstances. These efforts must have been undertaken before Δ knew or reasonably should have known that a jurisdiction had detected the failure to register.

(4) Failure to register is a groupable offense under §3D1.2(d) because it's an ongoing and continuous offense.

E. New guideline §2A3.6 (Aggravated offenses relating to registration as a sex

offender) addresses two new offenses:

(1) committing crime of violence while in failure-to-register status, 18 USC § 2250(c), statutory minimum 5 years consecutive. Guideline sentence is the statutory minimum.

(2) committing felony offense involving a minor while in failure-to-register status, statutory minimum 10 years consecutive. Guideline sentence is the statutory minimum.

(3) Application note mentions availability of upward departure from statutory minimum if, for example, sex offense was committed against minor or offense resulted in serious bodily injury to a minor.

F. New base offense level 34 in §2G1.1 (Promoting a commercial sex act or prohibited sexual conduct with an individual other than a minor) if offense involves sex trafficking of an adult by force, fraud, or coercion. Statute creates mandatory minimum 15 years.

G. New base offense levels in §2G1.3 based on increased mandatory minimums under Adam Walsh Act:

(1) 15 years for sex trafficking children under 14 (base offense level 34);

(2) 10 years for sex trafficking children between 14 and 18 (base 30);

(3) 10 years for persuading, enticing or transporting a minor to engage in prostitution or sexual activity (base 28).

H. New offense at 18 USC §2257A imposes new recordkeeping obligations for production of books, films, etc. containing visual depictions of simulated sexually explicit conduct. Amend refers this offense to §2G2.5 (Recordkeeping offenses involving the production of sexually explicit materials).

I. Child exploitation enterprises: new offense at 18 USC §2252A(g) provides mandatory minimum 20-years for committing enumerated sex offenses as part of series of three or more separate incidents involving more than one victim and in concert with three or more other people.

(1) New guideline §2G2.6 (Child exploitation enterprises) has base offense level 35 with four specific offense characteristics, at least one of which will likely apply and bring the guidelines up to the mandatory minimum without any other adjustments.

J. The Act increased penalties for using misleading domain names to get minors to view harmful materials on internet or knowingly embedding words or images into a website's source code with intent to deceive a person into viewing obscenity. Amendment adds "embedded words or digital images" into §2G3.1's provision for 2-level enhancement.

K. Amendment to §2J1.2 (Obstruction of justice) provides 4-level increase if defendant is convicted of committing fraud or making false statements under §

1001 in relation to sex offenses. Application note mentions upward departure in case of particularly serious sex offense.

L. Amendment to §4B1.5 (Repeat and dangerous sex offender against minors) adds sex trafficking of children or by force, fraud, or coercion, 18 USC § 1591, to the list of "covered sex crimes."

M. Amendment to conditions of probation, §5B1.3, and supervised release, §5D1.3, requires Δ's to comply with registration requirements under Adam Walsh Act.

N. Adam Walsh Act provided for terms of supervised release of up to life for some sex offenses. Amendment adds those offenses to the list at §5D1.2(b)(2) for which lifetime supervised release can be imposed.

O. Amendment defines "minor" in a manner consistent with definition in other parts of guidelines. Includes individuals, fictitious or not, represented by law enforcement officers to be under 18 and available for sexually explicit conduct.

5. Corrections to §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft . . .) and 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)

   A. Earlier amendment created typo in §2B1.1(b)(13)(C), which affected potential 8-level increase for number of victims and endangering financial security of institutions or victims.

   B. Earlier amendment created typo in §2L1.1(b)(1), which affected potential 3-level reduction for smuggling only family members and not for profit.

   C. Commission has decided these amendments should be applied retroactively under §1B1.10.

6. Miscellaneous Laws

   A. Based on new offense at 38 USC § 2413, amendment to trespass guideline, §2B2.3, expands scope of 2-level increase to include trespass at Arlington National Cemetery or cemeteries under control of National Cemetery Administration.

   B. New offense at 31 USC § 5363 prohibits acceptance of any financial instrument for unlawful internet gambling, has statutory maximum of 5 years, and now falls under §2E3.1 (Gambling offenses).

7. Repromulgation of Emergency Amendments on Intellectual Property

   A. Adds provision to application note of §2B5.3 (Criminal infringement of copyright or trademark) to provide that the infringement amount is based on the retail value of the infringed item in cases involving counterfeit labels, patches, wrappers, packaging, etc. The "infringed item" is the identifiable genuine good.

B. Amendment addresses circumvention devices:
   (1) If Δ used circumvention device to obtain unauthorized access to a copyrighted work, "retail value of the infringed item" is price user would have paid to access the copyrighted work lawfully.
   (2) Provides increased punishment for Δ's who traffic in circumvention devices and thereby enable others to infringe copyrights or trademarks.
C. Strikes earlier provision that imposed automatic increase for use of special skill when a de-encryption or circumvention devise is used.
D. Adds mention of downward departure to application note in cases in which method of calculating infringement amount might overstate actual pecuniary harm to copyright or trademark owner.

8. Drugs - implements new offenses created by USA PATRIOT Reauthorization Act and Adam Walsh Act
   A. New offense at 21 USC § 865 for smuggling meth or precursors into U.S. by someone enrolled a dedicated commuter lane or accelerated inspection system. Requires sentence of up to 15 years consecutive to sentence for underlying drug offense. Guideline amendments at §§2D1.1 and 2D1.11 provide 2-level increase for committing this offense.
   B. §2D1.1 modified to provide 2-level increase at §2D1.1(b)(9) for individuals who sell date rape drug on internet and know or have reason cause to believe the drug would be used in commission of sex offense. Implements new offense at 21 USC § 841(g) (Internet Sales of Date Rape Drugs), which defines "date rape drug" as GHB, its analogs, ketamine, flunitrazipam, or "any substance which the Attorney General designates . . . to be used in committing rape or sexual assault."
   C. Amendment modifies drug quantity table to eliminate maximum base offense level of 20 for ketamine offenses.
   D. Adds to application note 10 a new drug equivalency for BD and GBL, both of which are included in the definition of date rape drugs; neither is a controlled substance.
   E. Addresses new offense at 21 USC §860a (Consecutive sentence for manufacturing or distributing, or possessing with intent to manufacture or distribute, methamphetamine on premises where children are present or reside). Builds on current substantial risk enhancements:
      (1) distributing or possessing meth with intent to distribute on premises where minor is present or resides gets 2-level increase, with minimum offense level 14;
      (2) manufacturing or possessing with intent to manufacture methamphetamine on premises where a minor is present or resides gets

3-level increase, with a minimum offense level of 27.

F. Provides instructions for judges on how to complete judgment forms to comply with requirements in §§860a and 865 that the sentences include a consecutive component.

9. Cocaine Base Sentencing
   A. Amends drug quantity table to reduce offense levels for crack offenses by 2. Current base offense levels correspond to guideline ranges that are above mandatory minimums, e.g. 5 grams has 5-year minimum but is at level 26 and a range of 63 to 78 months. Amendment creates base offense levels that include the mandatory minimums, e.g. 5 grams is level 24 and a range of 51 to 63 months. Commission acknowledges this "is neither a permanent nor a complete solution to [the problems associated with the 100-to-1 drug quantity ratio]. Any comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress."

10. Technical amendments
   A. Clears up typos in §2D1.11 and 2K2.1
   B. Adds commentary to grouping rules, §3D1.1, to provide that sentences on multiple counts can be from one indictment or in different indictments, for example, when a case is transferred to another district for sentencing under FRCrP 20(a).

11. Repromulgation of emergency amendment on pretexting and other privacy-related offenses
   A. Repromulgates emergency amendment for new offense at 18 USC § 1039 relating to disclosure of telephone records and refers this offense to §2H3.1 (Interception of communications; eavesdropping; disclosure of tax information). Mentions possible upward departure if phone or tax record information for substantial number of people is involved.
   B. New offense at 42 USC § 16962 provides 10 year maximum for improper release of information obtained in fingerprint-based checks for background checks of foster or adoptive parents or persons employed by or considering employment by private or public educational agency. Offense falls under §2H3.1 and has base offense level 9.
   C. New offense at 42 USC 16984 prohibits misuse of a child's fingerprints and is referred to §2H3.1 with base offense level 6.
   D. New offenses at 8 USC §§ 1375a(d)(3)(C) and (5)(B) require marriage brokers to keep private information gathered in the course of their business confidential. Violations fall under §2H3.1

12. Criminal History

A. Amendment eliminates use of the term "related cases" at §4A1.2(a)(2) and instead uses "single" and "separate" sentences.

(1) Initial inquiry is whether the prior offenses were separated by intervening arrest. If so, they're considered separate sentences, are counted separately, and no further inquiry is needed.

(2) If not separated by intervening arrest, sentences are counted as separate unless (1) were for offenses named in the same charging document, or (2) were imposed on the same day.

B. If have single sentence that comprises multiple concurrent sentences of varying lengths, use the longest sentence for assigning criminal history points. If have single sentence that one or more consecutive sentences, use the aggregate sentence to assign criminal history points.

C. Amendment provides for upward departure if counting multiple prior sentences as a single sentence underrepresents seriousness of Δ's criminal history.

D. Amendment moves fish and game violations and local ordinance violations to the list of offenses in §4A1.2(c)(2) that never receive criminal history points.

E. Restricts §4A1.2(c)(1) to say that offenses listed there count for criminal history points if the sentence was a term of probation of "more than" one year, instead of current limit of a term of probation of "at least" one year.

F. Resolves circuit conflict over method to be used in determining whether a non-listed offense is "similar to" an offense listed at §4A1.2(c)(1) or (2). Rejects strict elements test used by 8th Circuit and other circuits. Adopts "common sense approach" used in *US v Hardeman*, 933 F2d 278, 281 (5th Cir 1991), which includes consideration of all relevant factors of similarity such as "punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct."

FORENSIC ISSUES IN METH CASES

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Methamphetamine, Clandestine Labs And Other Interesting Information

In recent years the emphasis in law enforcement has been the eradication of the "Meth" problem in this country. A great deal of federal and state funds have been spent in equipping and training police officers in this area.

The Methamphetamine problem is certainly not new. What has changed is the synthesis methods that make the production of this drug easier and quicker. Today's meth labs are not as sophisticated, require much less specialized equipment and can manufacture the drug in a matter of hours not days. Most of the methods used today were found in a wide variety of academic sources and journals and have been altered to meet the needs of the home cooker.

This document will explore many of the facets involved in meth lab cases. Must of the information presented has been found in forensic journals, internet web sites and from counter culture books specializing in the topics of clandestine drugs. This document should not be considered the "all inclusive treatise" on the subject, rather a means to familiarize the attorneys with the various facets of meth cases derived from the above sources in addition to the findings of case reviews by Forensic Consulting.

Finally it is important to understand no two clandestine lab cases are alike. Clandestine lab cases can be as complex as any murder investigation placing the attorney in the position of having to understand legal, investigative and chemical principles. While it may be possible to make certain "generalities" about these cases, very often the evidence seized will vary significantly. It is important to obtain "outside" assistance on cases like this to ensure the case being presented is accurate.

Gene N. Gietzen

Methamphetamine

Methamphetamine is not a recent addition our "better living through chemistry" society. It has been only in the past 30 – 40 years, or so, it has been scientifically studied and its effects and potentials determined.

The use of central nervous stimulants, such as methamphetamine, reached epidemic proportions during the late 1940's and early 1950's, especially during WW II. At one time the Department of Defense placed methamphetamine pills into what they referred to as "Go Packs." These pills were used by the military as a countermeasure to fatigue induced by circadian desynchronosis (disruption of the natural day/night circadian rhythms).

In the 1960's the use of this drug became a social problem. Methamphetamine was, and still is, pharmaceutically prepared by Abbott Laboratories and is sold under the names of "Desoxyn" or "Methedrine." Today it is used as a treatment for Attention Deficit Disorder and narcolepsy..

Methamphetamine is classified as a central nervous stimulant. Because of its abuse potential it was placed as a Schedule II Drug in the Controlled Substances Act noting its potential for severe psychic or physical dependency.

The effects of methamphetamine include:

1. Increased alertness
2. Excitation
3. Euphoria
4. Increased pulse rate
5. Increased blood pressure
6. Insomnia
7. Loss of appetite
8. Slurred speech
9. Anxiousness
10. Paranoia
11. Hallucination
12. Aggressive behavior
13. Violent behavior
14. Twitching/jerkiness
15. Delusions of grandeur

It is common for hard core users of the drug to be on a multiple day high. During these times these individuals go without sleep and are subject to strong mood swings and violence. The physical dependencies are such individuals will do just about anything to obtain meth

Methamphetamine in the base form exists as a yellow liquid. In the base form, meth is not readily useable and most meth encountered will be in the salt form, generally as Methamphetamine Hydrochloride. In many instances, you will hear talk about d-meth or l-meth. D-methamphetamine is the psychoactive drug and differs from the "l" version due to the placement of the Methyl group (CH_3) on the molecule.

Common street names for the drug include "Speed", "Crank", "Go", "Crystal" and "meth." These versions are generally snorted or injected. Another version of meth is "Ice". While it is the same drug as the above, it is generally smoked and due to the rapid absorption of the drug through the lungs, the effects are more pronounced and quicker.

The Analysis of Methamphetamine

Methamphetamine samples submitted to forensic labs can appear in a wide variety of forms. It can be in the form of a white, tan, off white, yellow or pinkish powder depending on the synthesis method and the cutting agent used.

It is also not uncommon to find meth in the form of a slurry. Many "buys" were made of an off-white powder to find its consistency changed prior to testing. Very often this was entirely due to the synthesis methodology. In these instances, the meth was in a form that was "hydroscopic" (moisture absorbing) and would liquefy due to this reason.

The actual analysis of meth is a straight forward procedure. Depending on the laboratory protocol, it can involve these steps:

Color tests

1. The first color test used is called the "Marquis" test. This test consists of a reagent made with Sulfuric Acid and Acetaldehyde. Adding a small amount of meth sample to a spot plate will result in an "orange to brown" color.

   This test is not specific for meth as it will react with many other compounds, such as Amphetamine. This initial test is used as an indicator to the forensic analyst.

2. The second color test that can be used on meth samples is called the "Nitroprusside" test. This reagent is made with Sodium Nitroprusside dissolved in distilled water. A blue color with this reagent is indicative of a "secondary amine", such as meth, and does differentiate meth from amphetamine.

A few words on color tests: 1) They are subjective in that the analyst must be able to distinguish colors. The concentration of meth in the powder can affect the intensity of the color as well as the speed of its formation. 2) There is no color scale employed by the forensic analyst to determine if it is the correct orange. 3) Color tests are not sufficient to make a positive identification.

We will discuss the topic of "Field Test Kits" later in this article.

Thin Layer Chromatography

Thin Layer Chromatography is an old method which, before the advent of instrumentation, formed the crux of the analytical opinion. This method is still used in many labs. Thin Layer Chromatography is a separate technique in which the sample is spotted on a glass plate coated with a very thin layer of silica gel. The plates are placed in a chamber containing a solvent or combination of solvents. Through capillary action, the drug is carried up the plate and stops depending on its affinity for the solvent. After the solvent has been allowed to migrate almost to the top of the plate, it is dried and then visualized in a variety of manners.

This method generally employs the use of known standards spotted alongside the suspected drug. This provides a reference as if the known and unknown are the same or similar drugs, they will migrate about equal distance and form the same color upon visualization.

Some forensic laboratories will use only one solvent system while others will use a combination of systems to demonstrate the same distance traveled up the plate between known and unknown.

This method is not considered positive identification for any drug. It is considered another test available to the analyst to confirm the results of the color tests.

Infrared Spectroscopy

This method forms the first of the instrumentational methods and is considered positive identification for a compound.

Most often the meth is extracted from its powder form via the use of various solvents. It is then placed on a surface, such as Potassium Bromide, and is subjected to an infrared radiation source covering the entire infrared region of light. The sample drug will absorb or transmit the various frequencies of the light and the result is a printout of this reaction.

This print out will consist of a pattern of peaks and valleys. Specific components of the meth molecule can be seen in this pattern. By the use of this "infrared fingerprint" and comparing it with known methamphetamine standards, a positive identification can be made.

This method is extremely useful in most cases, but the greatest draw back comes from meth samples that may contain pseudoephedrine/ephedrine or other compounds. It is not always possible to completely remove these other constituents and the obtained infrared spectrum will be a composite of more than one drug.

Modern Infrared equipment is computer based and data manipulation is very easy to do. For example, the computers allow you to remove the spectrums of the other components and arrive at what is believed to be the spectrum of meth. If an analyst chooses to do data manipulation, they must better be prepared to explain the process in courts.

Gas Chromatography/Mass Spectroscopy

GC/MS is now the staple of the analytical process in the identification of methamphetamine. In general terms the sample is injected into a gas chromatograph where it is separated in a similar way as TLC. As the sample exits the column inside the GC, it is ionized and selectively monitored by a mass analyzer. The ions exit the mass analyzer and enter a detector where the data is captured and produced in a meaningful manner.

In essence the sample is broken down into its component parts and the amount of these compound parts form the printout called the "total ion chromatogram." (TIC) Computer capabilities allow these to be analyzed and compared with known compounds.

GC/MS is a simple method. The purported meth is dissolved in a solvent and then injected. The TIC is characteristic of a given compound.

It is the ease of GC/MS which can create the potential for error. Many labs have what are called "auto-samplers" which allows the analyst to prepare 20 or so samples, place them in a tray, much like a slide projector tray, set the program and walk away. This is generally done overnight and the analyst then reviews the data and arrives at an opinion. Any error in the placing of the vial in the tray or skipping a sample can cause the entire run to be in error.

Another concern in GC/MS involves the comparison of known to unknown. Most "canned" libraries are not produced at the same settings as the instruments in question. While there is generally little variance between the library and questioned sample, this is a source of defense questioning. Many labs have built their own library based upon the running of known drugs on their equipment. This makes the comparison and interpretation more accurate.

I would not suggest you attempt to interpret the data obtained from a GC/MS analysis unless you have the background. What is even worse is to question an analyst about this data without being totally versed in the process and interpretation. I guarantee you will lose control of that cross.

There are a couple other analytical methods available to the analyst, but are rarely encountered. They are "microcrystalline tests" and "melting point determination." These are old methods and most of the time they are not taught to new forensic scientists.

The reason I placed this section in this publication is not only to make you aware of what should be done, but also to let you know the analysis via GC/MS can often be used as an indicator of the synthesis methodology used in the manufacturing of meth. For example, finding a sample containing meth and ephedrine will lead one to conclude ephedrine was the primary precursor. If N-formylMethamphetamine was found, this would indicate a P-2-P Method.

GC/MS can also be used to compare samples for potential similarities. If there are additional compounds present in the sample, the chromatograms can be examined to determine if the same constituents are found in multiple samples. This could be important in those buy/bust lab situations where the buy meth is not similar to the meth taken from the suspects abode.

When dealing with meth lab samples, you may encounter reports that opine the presence of lithium. There are various methods that are used in this determination. The opinion contained in the report is not always the issue, it can be the importance the analyst affixes to this find. Some analysts believe this is proof positive of recent cooking. It is possible to find lithium in almost every sample of meth produced by this method. Caution should be taken when addressing this issue.

Finally, most of these analytical methods produce data that is available to the attorney. It should be evaluated by a competent person who can then provide you with the information obtained from this review. We will discuss this more in the Bench Notes section.

Methamphetamine Synthesis Methods

In this section we will briefly touch on the variety of means by which methamphetamine can be produced. Most of the methods presented here are rarely used and uncommon to most law enforcement officers.

Back in 1982 an article in the *Journal of Forensic Sciences* by R.S. Frank indicated the most popular method of synthesis in over 50% of the lab seizures involved the use of phenyl-2-propanone (P-2-P), methylamine, mercuric chloride and aluminum metal in alcohol.

Another method he lists comprising less than 10% of the seizures involve a "Leuckart reaction" where P-2-P was refluxed with either methylamine and formic acid or N-Methylformamide to form an intermediate N-formylMethamphetamine with the conversion of this to meth.

This is important information to understand the methods being used today. Let's look at some aspects of these older methods:

1. These methods required a great deal more knowledge on the part of the "cookers". Many of these individuals were hired to set up and run labs. These people would come to a particular town and stay only long enough to create the product, collect their money and go onto the next lab.

   Some of these individuals were degreed chemists who discovered a more profitable life in illegal drugs. There was a certain "expertise" involved in these methods that you do not find in today's cooks.

2. Most of the chemicals used in these methodologies are no longer easily available without raising a number of red flags. P-2-P is now a Controlled Substance and chemical companies will not sell any of these to individuals. This has created the formation of "dummy" lab names and shipped to "store fronts."

3. These methods were "real" cooking methods. Refluxing is a term used in chemistry to denote a substance is allowed to boil. On top of the reaction vessel is an apparatus called a

condenser. This condenser cooled the vapor returning it to a liquid form. The give away on these older methods was utility bills. These old clandestine labs used a great amount of electricity and water, hence providing law enforcement with the ability to track this usage.

4. The older methods required the use of specialized chemistry equipment. Three necked flasks, condensers and round bottom heaters are just a few. Again in today's world these types of purchases are monitored by both the chemical supply company and law enforcement.

5. These methods were also much more dangerous. We hear today about the hazardous nature of meth labs, but I believe these older methods were even more hazardous. There was a strong potential for fire as heating was involved. If the reaction was stopped prior to completion a definite explosive potential existed. Couple this with the use of the same solvents in place today and it is a wonder more individuals didn't lose their lives in clandestine lab related accidents.

6. Last, but not least, these methods took a great deal of time. Cooking times of multiple days were not uncommon. The longer it takes to achieve a product, the greater the potential for detection.

The final older method I wish to present is the extraction of Vick's Inhalers. Vick's inhalers contain the compound l-desoxyephedrine or l-Methamphetamine.

The process was fairly simple in that you would go to the store, buy all the inhalers on the shelf and extract the l-Meth. The problem with this particular method is the product is l-methamphetamine is not the active drug. These inhalers also contained menthol or camphor that is hard to remove from the product.

This particular method was the rage in the mid to late 80's and set the tone for devising newer, less expense and cheaper methods that we enjoy today.

Pseudoephedrine/Ephedrine

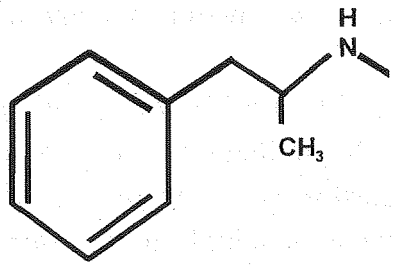
The most common precursor to the current clandestine manufacture of methamphetamine is either ephedrine or pseudoephedrine (PSE). We will discuss the differences between these two shortly.

Ephedrine has its roots (no pun intended) in the Chinese herb Mahuang. This low growing, evergreen, almost leafless shrub has been used in Traditional Chinese Medicine for over 5,000 years. Mahung contains ephedrine and many other similar alkaloids. The use of Mahung as precursor material has been documented, but it does involve a variety of extraction processes in an attempt to isolate the ephedrine. Mahuang treats such maladies as Cold & Flu, Fever, Chills, Headache and Nasal Decongestion.

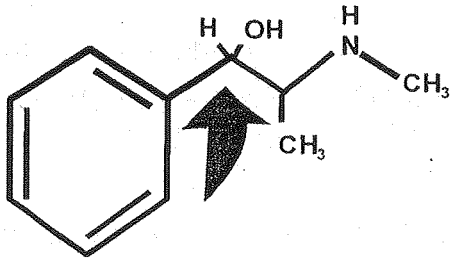
A specie of this herb, Ephedra nevadensis is found in the Southwest deserts. It was used as a tea by the early settlers and has gained the name of "Mormon Tea", "Brigham Tea" and "Desert Tea". The North American plant is generally believed to have no pharmacologically active alkaloids.

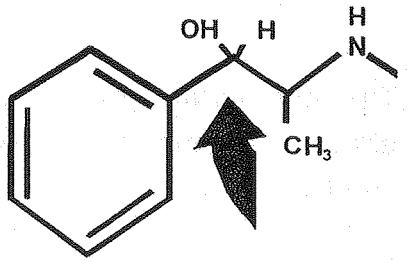
Today pseudoephedrine/ephedrine is found in many over the counter (OTC) cold and flu preparations. It is just this commonality that provides the precursors for methamphetamine synthesis.

Now let's look at the chemical structures of these three and note the reason pseudoephedrine/ephedrine is so popular.



Methamphetamine





Ephedrine Pseudoephedrine

One can easily see, ephedrine and pseudoephedrine are almost identical to methamphetamine. The sole difference is the presence of an OH or hydroxyl group indicated by the blue arrow.

The position of this hydroxyl group is the determining factor as to whether you have ephedrine or pseudoephedrine. The reason as to why both are precursors for meth is because the chemical reaction removes the OH group and presto methamphetamine.

In many meth lab cases I have reviewed the presence of blister packs or empty boxes/bottles of OTC cold medications has been used as the evidence of this primary precursor in those cases where no actual ephedrine/pseudoephedrine was found. I have seen Federal cases where the "theoretical yield" has been calculated on the number of boxes, the number of bottles etc.

It is also well known stores that sell over the counter medications containing these two drugs will limit the number of boxes that can be purchased. Many businesses will notify law enforcement if an individual walks away with too many or attempts to buy larger amounts

I have also noted a variety of "mini-thins" sold in the stores has the amount of pseudoephedrine reduced to 30 milligrams and have added drug such as guafenesine, triprolidine and others. Guafenesine is an antitussive drug (stops cough) and the interesting thing about this additive is that it is soluble in the same solvents as pseudephedrine except one. This makes the separation of PSE more difficult in these products and the possibility exists the guafenesin can be converted to 1-butoxy-4-Methoxy benzene in the one method. Since there is a greater amount of guafenesin present in the pill, it is possible it will compete with the PSE, thus yielding less meth.

The final note to make about these precursors is the elimination of ephedrine as the precursor. While it is still available, most OTC drug preps contain pseudoephedrine.

Extraction of Pseudoephedrine

Over a period of the last few years, pharmaceutical companies have begun to place additives into over the counter PSE tablets. Some of these additives are waxes, solid fillers, sodium starch gluconate and other substances. Most of these substances do not lend well to the synthesis of meth, by design some sources say. Removal of these substances is a required step in the manufacture of meth

Look at a box of Sudafed 12 hour caplets.

> ACTIVE INGREDIENT: Each coated extended-release tablet contains Pseudoephedrine Hydrochloride 120 mg.
>
> INACTIVE INGREDIENTS: Carnauba Wax, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Polyethylene Glycol, Povidone, and Titanium Dioxide. Printed with edible blue ink.

The active ingredient is 120 milligrams of Pseudoephedrine Hydrochloride. Now check out the inactive ingredients. The weight of a single Sudafed tablet is 0.6274 grams. If you remove the 0.120 grams of pseudoephedrine, you find 0.5074 grams of filler etc. If you like percentages, 20% of the weight of the caplet is pseudoephedrine, the remaining 80% is junk.

A general scheme for the extraction of PSE goes like this:

1. The pseudoephedrine pills are ground in a blender or similar device until they are now a fine powder.
2. The powder is soaked in denatured alcohol, HEET (methanol) or water for at least 40 minutes, although the longer the better.
3. Filter this solution and retain the solvent
4. Re-add solvent to the sludge, stir one hour and then re-filter
5. Evaporate the alcohol until a solid white powder is formed.

If the PSE is not extracted and used directly from the bottles, emulsions and other unwanted items are formed. All of this reduces the yield.

In a recent preliminary experiment using Heet and various times, I was found it was possible to extract almost 70% of the pseudoephedrine from the over the counter medications. This is another consideration when dealing with theoretical yields.

New on the horizon is the addition of other agents making the extraction of pseudoephedrine more difficult. There is also a proposal to eliminate the listing of the active ingredients, listing them as "sympathomimetric amines" to thwart the use of this as precursor.

Some of the discussion groups on the internet are talking about a new method of extracting pseudoephedrine that may eliminate many of the associated problems. This is called a "steam distillation" method. It is a little more complex but avoids the issues regarding solvent extraction. I have not encountered this method in any cases submitted to date.

We have now covered most of the preliminary information and it's time to move onto the most current synthesis methods encountered.

Lithium/Anhydrous Ammonia Method

This particular method can be more regionally based. In agricultural areas, such as Kansas and Iowa, this is the predominant method. This method of making meth is the result of the work of Gary Small and Alrene Minnela as published in the *Journal of Organic Chemistry,* Volume 40, pages 3151-3152 (1975). This reaction is also known as the "Birch Reaction." This method is known as the "Nazi Dope" method and is a "cold cook" method as no heat source is required.

The most common ingredients are:

1. Ephedrine or Pseudoephedrine
2. Lithium batteries/metal
3. Anhydrous Ammonia
4. Hydrochloric Acid
   - A. Muriatic Acid
   - B. Drain cleaners containing sulfuric acid and rock or table salt
5. Ether (Starting Fluid)
6. Acetone, Toluol, or Coleman Fuel Oil
7. Filters, jars, bottles, etc.

The Ephedrine/Pseudoephedrine are Precursors. You can have everything else, but without these two, no reaction can occur.

The Lithium and Anhydrous Ammonia are considered Essential Chemicals, without both, the reaction will not occur.

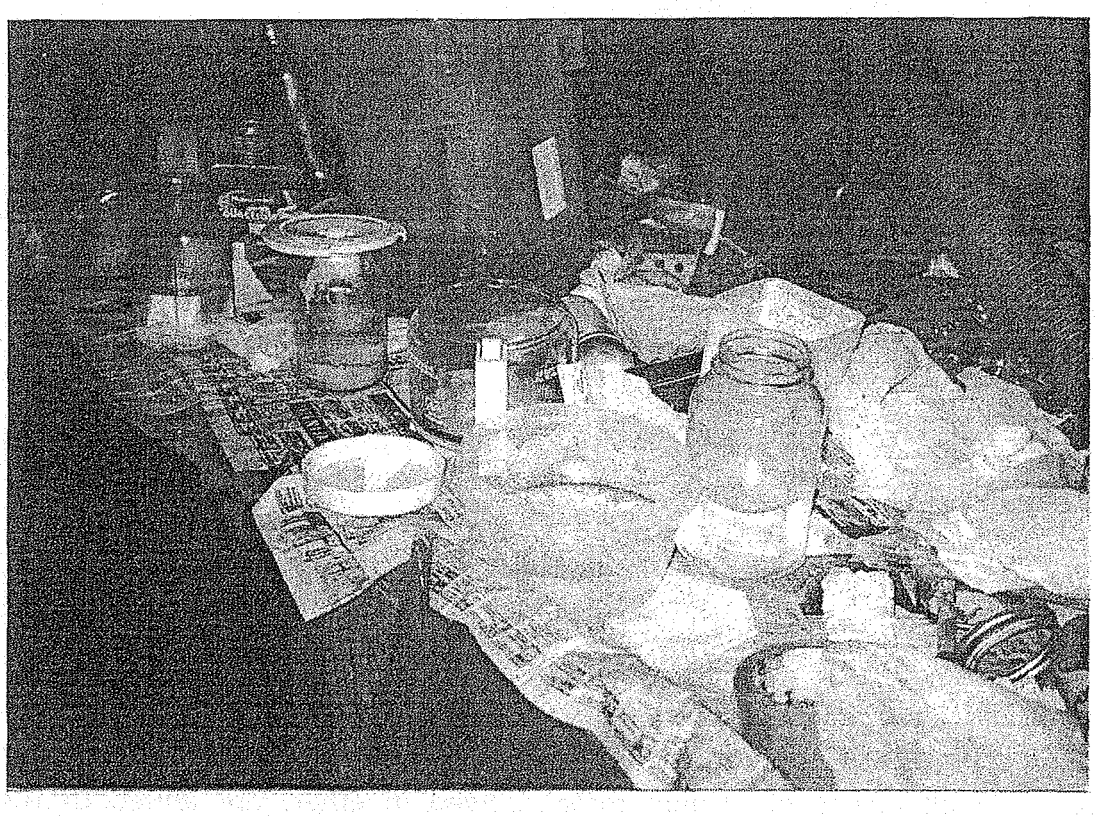
The general scheme of this method is something like the following. Keep in mind there are as many variations to this as there are fish in the sea.

1. Reaction vessel is cooled in an ice bath or acetone bath
2. The anhydrous ammonia is condensed into and collected in the reaction vessel.
3. Small pieces of lithium metal, rinsed in ether, are added to the condensed ammonia. A deep royal blue color indicates the reaction is ready to proceed.
4. PSE is added drop-wise into the reaction vessel. (More on this later)
5. After all the PSE is added, remove the reaction vessel from the bath.
6. The ammonia is allowed to come to room temperature and evaporate off.
7. When the ammonia is evaporated, water is added until the solution is clear.
8. The remaining lithium metal is discarded.
9. Solvent is added to the water and the water layer is discarded.
10. Hydrochloric acid gas is bubbled into the solvent forming methamphetamine HCl.

In this reaction the lithium metal dissolves in the anhydrous ammonia to form what has been referred to as a "dissolved electron" solution. The solution is known to have powerful reducing properties, meaning it is capable of removing the OH group from the pseudoephedrine.

Some of the considerations to this method include the fact if water is added to the reaction vessel at the beginning of the reaction, the reaction may not go to completion. The water will quench the dissolved electrons which are necessary to remove the OH group from the precursor. It is also recommended the PSE be in the base form as the hydrochloride salt interferes with the reaction.

This method requires very little expense or complex lab equipment. It also provides the ability to "mass produce" products by allowing different batches to be evaporating at the same time.



(An example of the Anhydrous Ammonia/Lithium apparatus)

In relation to the discussion of this method, we should cover some facets of this synthesis. Let's first explore Anhydrous Ammonia.

Anhydrous Ammonia's main current use is a fertilizer. You can often see large tanks on wheels in farmer's fields. These tanks are the primary source of the AA used in clandestine labs.

Anhydrous ammonia is a colorless gas with a very characteristic pungent odor (similar to drying urine). Under favorable conditions, AA when mixed with air will explode when ignited.

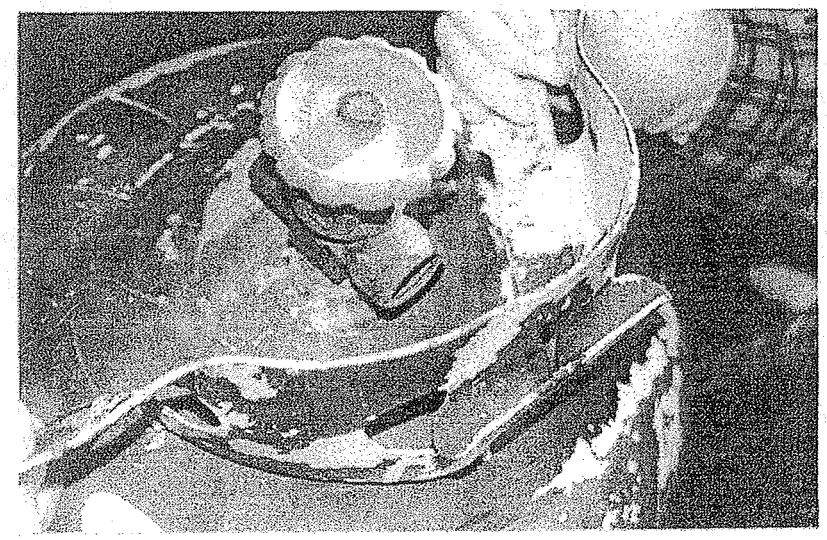
The anhydrous ammonia found in these large tanks is in liquid form. This creates a problem in obtaining this substance and storage until use. I have read various methods by which this is accomplished. In several cases, the suspect's purportedly used 5 gallons buckets which they sealed and took back to the "lab." Probably the most common method is involves the transfer from the large container to an empty compressed gas cylinder like the ones used on barbeque grills.

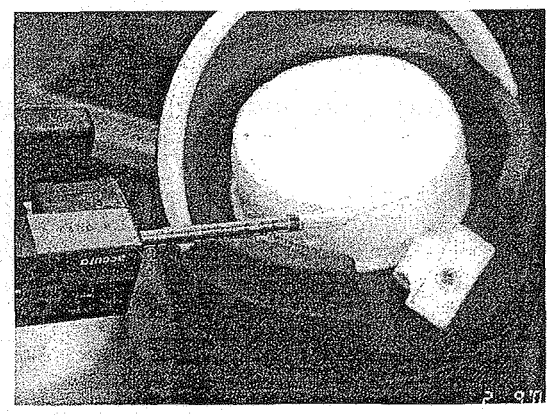
There are means by which adapters can be connected to a hose and the transfer of AA goes relatively smoothly, going from an area of high pressure (the large tank) to an area of low pressure (the compressed cylinder tank). Other means involve using hoses without adapters which can be illustrated through the finding of larger diameter tubing at clandestine lab scenes.

Almost every case I have reviewed where compressed gas cylinders were found, the allegation is made it contains anhydrous ammonia. Very often, the investigators have not opened the valve to make this determination. Equally often this container is seized and destroyed as "hazardous material" leaving the attorney with only a picture.

Compressed gas cylinders are a surface conducive to fingerprinting, something I have never seen conducted. This can be an important point in those cases where multiple individuals are found.

Many investigators will point to a blue/green discoloration around the valve of these cylinders as indicative of the presence of anhydrous ammonia. Some agencies will use a "Drager" tube, pictured below, as an indicator of the presence of ammonia.





Drager Tube Test for ammonia

Blue/Green discoloration around the valve)

The use of thermos bottles, such as depicted in the above right photo, have been reportedly used for the storage of anhydrous. These are not sealed systems and not designed for the kind of pressure required to keep anhydrous in its liquid state. Care should be exhibited on those cases in which a sample is removed from thermoses and is purported to be anhydrous. It would probably be ammonium hydroxide, which is not a suitable replacement for anhydrous.

A final point to be made regarding anhydrous ammonia comes in those cases where the state alleges subject stole the AA prior to the synthesis. Unless there is some mechanism of adapters and hoses, overexposure to anhydrous ammonia can lead to these potential symptoms:

1. Eye, nose and throat irritation
2. Dyspnea
3. Broncho spasm and chest pains
4. Pulmonary edema
5. Skin burns

Just about every mechanism I have reviewed does involve the potential exposure to anhydrous ammonia. Many reaction vessels are jars, tubs or 5 gallon buckets, so the vapors would be pronounced.

You will find many in law enforcement received training in these types of labs. Most of it will include training on disposal or precautions around these scenes. Police officers have been taught the ramifications from getting "up close and personal" with this stuff, but it has been my experience they will not testify or remember this if this fact benefits the defense.

Lithium batteries is the other essential chemicals for this method. Lithium commonly found in photographic and now general use batteries.

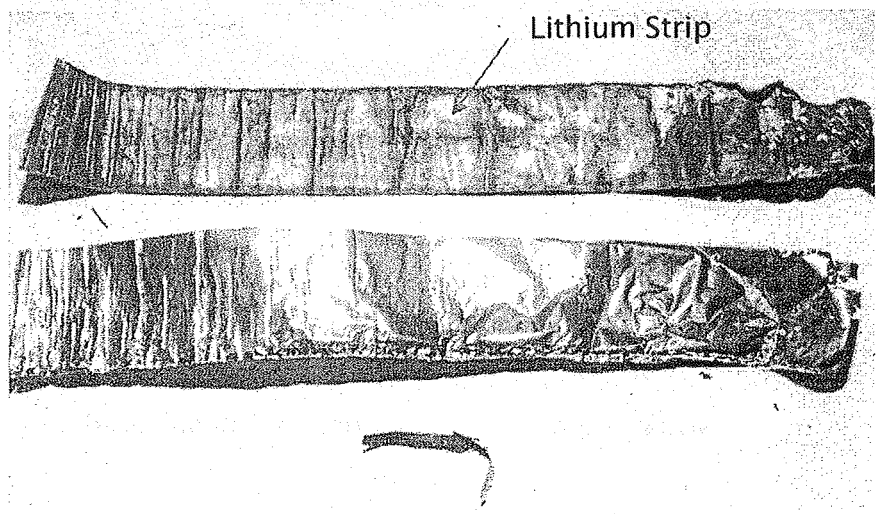
The item of interest in these batteries is the lithium metal. Lithium metal is silvery-white which becomes yellowish on exposure to moist air. This metal also carries some potential symptoms of mild to severe over-exposure that can be gained through handling without proper protection:

1. Impaired concentration
2. Lethargy
3. Irritability

4. Muscle weakness
5. Confusion
6. Impaired consciousness

Most often batteries found at the scene are intact. Battery hulls or other evidence of altered battery casings supports the use of the lithium metal and could be subject to latent printing.

It is important for the attorney to view the evidence prior to court. In a meth lab case I was involved in, when we viewed the evidence we found the batteries were alkaline and did not have anything to do with the conversion to meth.



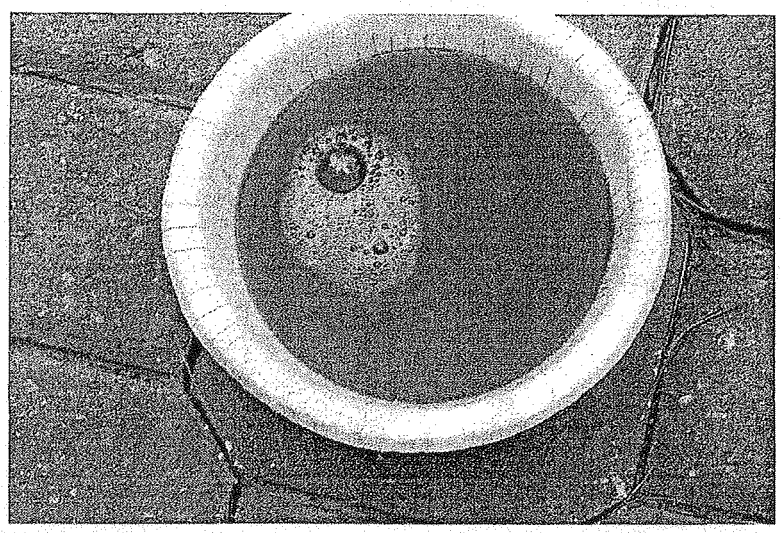
The lithium strip is approximately 10" long and is lighter than the aluminum foil below it. It will darken in light and burn with greater intensity as (bright and hot). In a fire, it will leave very little evidence of its existence.

Lithium, like sodium metal will react with water. Lithium, unlike sodium, does not react in the same violent manner. Once lithium is placed in contact with water, it begins to effervesce much like an Alka Seltzer producing hydrogen gas. Ultimately the lithium metal will completely react leaving a solution of lithium hydroxide.

This is the main reason for the addition of the extracted precursor in a solvent. If the PSE is an aqueous solution, the lithium will be destroyed and the reaction will not occur.

In some cases I have reviewed, the investigators have talked about the "explosive" nature of lithium when it comes in contact with water. I have not found this to be the case. Solid sodium metal, which can be used to manufacture meth, will react violently in the presence of

water and does "explode." The photo below shows the reaction of lithium metal when placed in water. I have found that it "fizzles" like "Alka Seltzer."



In those cases where the investigators allege to have found lithium strip residues in burn piles etc., be very cautious. If you encounter a case where a "mesh" is identified as being lithium this is incorrect.

The Anhydrous Cook method is the easiest to conduct and obtain product. Agricultural supply companies have increased efforts to safeguard the large tanks and heightened patrols by law enforcement have resulted in many arrests. The interesting facet to these cases is they are often charged as "manufacturing" even though very little evidence of manufacturing is found.

Hydriodic Acid/Red Phosphorus Method

In this method the hydriodic acid is the reducing agent forming iodine and hydrogen. The pseudoephedrine absorbs the hydrogen atom from the hydriodic acid and meth is being formed.

The ingredients for this Method include:

1. Ephedrine or Pseudoephedrine
2. Iodine crystals, tincture of iodine
3. Red phosphorus
4. Solvents (Ether, acetone, toluol)
5. Lye (in some instances)
6. Reaction vessel with condenser
7. Filters, jars etc.

This method is more complicated than the Lithium/Anhydrous Ammonia Method. It also requires red phosphorus, hydriodic acid and iodine crystals, items a little harder to come by. This method is a "hot cook" method as it does require a heat source.

The general scheme for this method is as follows:

1. The precursor is added to the reaction vessel
2. The red phosphorus is added followed by
3. The hydriodic acid is added to the reaction vessel.
4. A condenser is added to the top of the reaction vessel.
5. The reaction vessel is allowed to boil for one day (usually much less).
6. After the day, the reaction vessel is allowed to cool.
7. The red phosphorus is filtered out.
8. Lye is added to the filtrate to neutralize the acid and make the solution basic.
9. The meth free base is seen floating on the surface of the water.
10. Solvent is added to extract the meth base.
11. Hydrochloric Acid is bubbled through the meth base forming methamphetamine.

A condenser, for those unfamiliar with the term, is a column of water above the reaction vessel. As the mixture boils, the condenser causes the vapor to condense back to a liquid and return to the reaction vessel. The best simile would be to take two pots and boil water on a stove. Leave one pot uncovered and place a lid on the other. The water will boil into a vapor on the uncovered pot leaving an empty vessel, while the pot covered with a lid will still retain much of the liquid.

This method also requires the use of the precursor in the hydrochloride salt.

The red phosphorus most common source is the striking pads of match books. These contain about 50% red phosphorus which must be purified from the other contaminants. It is possible to make red phosphorus, but these attempts often have explosive results.

Iodine crystals can often be found for sale at aquarium shops. The use of Iodine Tincture in the form of 2% or 7% solutions possesses new problems. The iodine must be removed from the tincture prior to use in this synthesis. There are a wide variety of extraction methods, the most common appears to use Hydrogen Peroxide.

Many cookers have been found to save the red phosphorus filtrates for their next batch.

There is some information that states the hydriodic acid (iodine crystals, water and red phosphorus should be "cooked" prior to the addition of the precursor. This reduces the potential for intermediate formation however, this is not always the case in the real world.

The addition of water to red phosphorus and iodine crystals is heat producing. That is why you will hear or see evidence of dry ice or ice to cook the reaction mixture.

The methamphetamine produced from this method often contains a reddish or pinkish coloration.

One of the interesting products of synthesis in this method is P-2-P, which was a primary precursor in the older methods. If noted upon analysis, the defendant could be charged with

possession of P-2-P, a controlled substance.

(The type of equipment used in the HI/Red Phosphorus Method)

When the cook decides to manufacture his own red phosphorus, you should keep in mind this will probably not as good as the red phosphorus purchased through chemical supply companies. This and the home-made hydriodic acid can affect the synthesis and the yield produced.

Now that we have touched the basics of the different synthesis methods and discussed some factors involving each, we will discuss some concepts and ideas common to meth Lab cases in general.

Substantial Step

This concept is one of interest to the trial attorney. Many state and federal laws describe a person must take a substantial step towards the commission of a crime. Here are a few Court of Appeals decisions on the topic that demonstrate the variance in interpretation:

U.S. vs. Wagner, 884 F. 2nd 1090, 1095 defined substantial step as an "overt act towards the commission of a crime must be something more than mere preparation, yet may be less than the actual commission of the substantiative crime."

Missouri vs. Shivelhood, 946 SW 2nd 363,266 defined substantial step as "conduct that is strongly corroborative of the firmness of the actor's intent."

Missouri vs. Wurtzberger, Case Number WD56473, handed down 11/9/99, Missouri Court of Appeals Western District discusses this concept and currently is used as the "authority" on this issue.

I am sure this makes more sense to you than it does to me, but this concept can be important as you prepare your cases. I have reviewed cases at both the state and federal level where not all required or essential chemicals are found. There appears to be the tendency for law enforcement to "infer" the other items were present at one time. I recall a case where the precursor material was found in the medicine cabinet, the solvents in the garage, coffee filters in a kitchen cabinet and the drain cleaner under the sink. While these are items found at clandestine lab scenes, their placement does not readily lead one to believe a substantial step was undertaken. I believe you will find these types of items in "any household USA."

The level of standard required to be considered a meth lab has significantly been reduced. This has created the situation where investigative personnel are offering "speculative" testimony regarding the missing items. Very often this type of testimony is allowed due to the "education and training" of the investigator. The bottom line is "speculation" is "speculation" and opinions should be based upon what was found, not what could be.

Substantial step was an issue of note in the late 90's. Case law, I am told, has watered this objection into oblivion. It can come into play when looking at a particular person's role in the investigation.

Chemical Odors

The use of chemical odors by investigators have been the basis of many search warrants. Some investigators are quite descriptive in their recanting the odors they detected while others use the generic chemical odors.

The most common chemical odors encountered are ether and ammonia. The odor of ether was sufficient in one case to cause the investigators to claim exigent circumstances and enter the residence to check on the health and well being of the occupants. There is a federal Court of Appeal decision upholding the exigent circumstances preposition.

Another investigator detected the odor of ammonia over 100 yards from a garage. This was used as evidence towards a search warrant. A "chemical" odor was detected by three different highway patrolmen in three different cases. The commonality was all three detected the odor in a moving police cruiser with the windows rolled up and the air conditioning on. The interesting thing is the odor was used as P/C for the investigation and it held up at motion to suppress hearings.

Don't get me wrong, ether and ammonia do have strong odors. Here are some of the things I have read:

REPORT: An investigator noted a subject standing on the porch of a residence wearing a coat and smoking a cigarette. In his training and experience, Meth cookers often smoke outside. It was 41 degrees and he was able to detect the odor of ether inside his under cover car parked about 150 feet from the house.

FINDINGS: In checking the weather, we found the day in question was 41 degrees and raining, a fact omitted in the investigators report.

The wind direction was blowing from the area of the investigators car towards the house, thus any odor of ether would be blown away from him.

There were no windows or doors open in the house. If the investigator did, in fact, smell ether, the man smoking on the porch would be a new satellite along with the house.

REPORT: Investigators detected a strong ether odor coming from the door area of a barn. Two of the suspects were placed under arrest at the barn door while cooking on a barbeque. A bottle of powder and ether was found in a microwave oven in the garage.

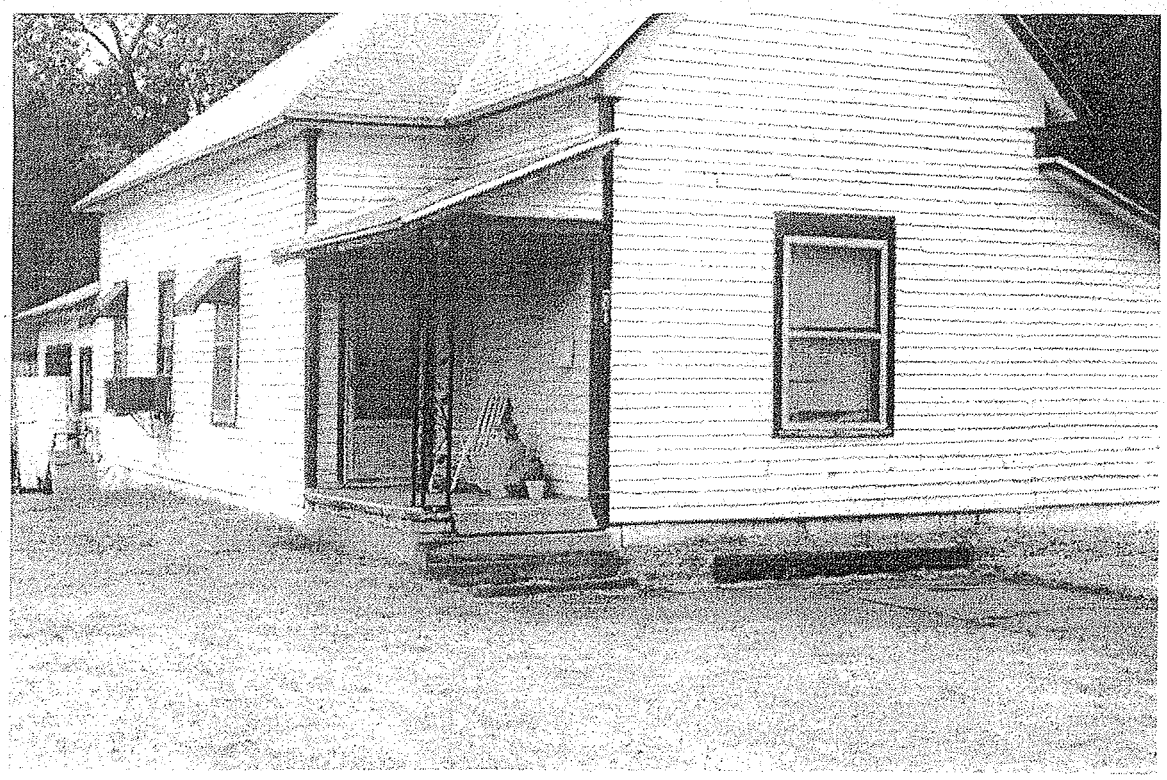
FINDINGS: There were no cans of starting fluid found inside or around the garage. The jar inside the microwave oven did contain a white powder, however, the solvent was found not to be ether. The only chemical of note was charcoal lighter fluid used to start the barbeque. The investigators would later say charcoal lighter fluid is often found at meth lab scenes.

As it relates to odors, one must remember odors are often perceived and some individual's sense of smell is better than others. If you don't believe me, make a comment among a group of people you smell natural gas when none is actually present. There is a high probability at least one in the group will smell it also.

The newest trend has been the use of the generic "chemical" odor notation. This is non specific and generally relates to what is found after the search. The key to any reported chemical odors is to attempt to get the investigator to be as specific as possible.

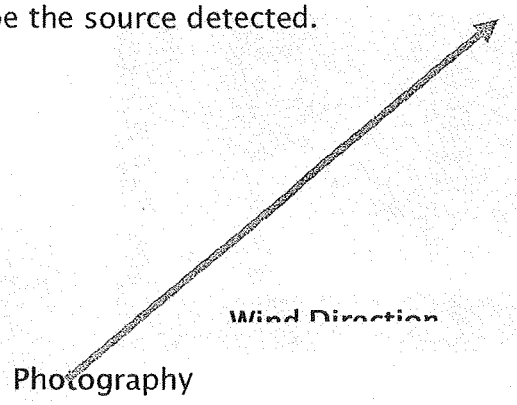
It is also important to obtain the weather data for that date as well as a diagram of the scene.

If chemicals are found the investigators should be able to recite the condition of these chemicals referring to whether they found them sealed, open etc. I remember a case where an officer noted in his report he detected a chemical odor when he entered the residence. The only problem was he was not one of the first entry personnel. He actually got there a little late and the chemical odors he detected were caused by other law enforcement personnel opening and playing with such things as starter fluid etc.



Windows and doors are closed, wind blowing away from the street yet chemical odor detected.

The term "chemical odor" is descriptically vague. It is very important to understand the potential sources of these odors. When you have a case involving odors, I strongly suggest you attempt to find the source of the odor. For example, if an ether odor is reported, there should be some ether source identifiable. I would also suggest you look at the photographs closely. Unsealed jars can be the source of the particular odor. Studying the analyst's bench notes may identify the liquid and whether it could be the source detected.



Photography

The particular topic ranges from very good documentation of the scene to no photographs at all. The best scenes are documented where the chemicals were found, noting their position, quantities, if possible, and their condition.

There is a general tendency in the cases I have reviewed to take a "group" photograph of the evidence. In these photographs, investigators will collect all chemicals, glassware, supplies etc and place them in one area to photograph.

This photograph may be a true and accurate depiction of what was found, but it certainly is not true and accurate of where it was found. These types of photographs can make a small operation look large and if presented in court to a jury, it may have greater misleading potential than evidential.

I would also suggest you examine all photographs taken at the scene and compare them to the inventory or evidence list. Hazardous items are generally disposed of and if they do not appear in the photographs, you might be able to suppress any mention of these items during trial.

I would encourage you to closely examine, or have the photographs closely examined for the purposes of explaining the evidence. For example, coffee filters were deemed to be part of the meth lab paraphernalia. The photograph clearly depicted the filters sitting adjacent to a coffee maker.

If there are photographs taken of the evidence in the laboratory, again check them again any other photographs or the evidence itself.

In instances where the scene was video taped, some of the tapes will not have audio. The original copy of the tape should be examined to determine whether the audio portion was included. The following are examples of "group photographs."

Gas Generators

These devices generate the hydrochloric acid needed to transform the meth base into meth salt. These have been noted as numerous sizes and configurations. Most often the evidence of gas generators includes the "Liquid Fire" and rock or table salt. Gas generators have been seen as nothing more than 2 liter bottles with tubing attached. Muriatic Acid is a substitute for the use of gas generators. Some cases will involve the use of aluminum foil. This foil is added to muriatic acid to help the generation of Hydrogen Chloride gas.

You should be aware that gas generators can be anything with a hose attached. In one case a plastic one gallon gas can with a hose in the spout was seized as evidence. The officer testified that it was a gas generator much like he has seen on other cases.

The only problem with this testimony which he did not have a quick response to was if this is, in fact, a gas generator where is the residue which should be present from the chemicals?

When we reviewed the evidence the gas can was clean. This was told to us to be the means by which the client filled his car, by going to the "neighbors" gas station.

As we will discuss briefly, there is a tendency in law enforcement to make almost everything meth Lab related and quite often they are right.

Solvents

This is a topic which is very broad. Some of the more common solvents found at meth labs include:

1. **Acetone** A good general solvent readily available. It is recommended for the extraction of ephedrine/pseudoephedrine as well as extraction of the final product.

2. **Toluol** Another good general solvent. This was once considered the solvent of choice in the extraction of the eth from the reaction mixture, but is rarely found today.

3. **Coleman Fuel** Another common item. This is encountered somewhat frequently. This is a higher weight petroleum hydrocarbon and somewhat more difficult to evaporate but is used to extract the precursor

4. **Heet** This product removes water from gas tanks and contains methyl alcohol. This is most commonly found in the extraction of the pseudoephedrine.

5. **Ether** Generally found in the form of starter fluid and is known as petroleum ether. This is good solvent for the extraction of meth. This is probably the most volatile solvent found at scenes. It is easily ignited and highly flammable by nature.

In those cases where only one solvent is found, the investigators generally make this the all inclusive and only solvent necessary. Most of these items will be deemed hazardous and destroyed.

If you look at the list, these are all items commonly found in many garages throughout the U.S. Keeping a close eye on where these items were found may be of great assistance in putting things in perspective.

Destroyed Evidence

As indicated previously anhydrous ammonia and many solvents are considered hazardous and are destroyed for safety purposes. In many cases involving what appears to be drugs in liquids, those solutions are sampled with the remaining portion destroyed. This is almost required for health and safety reasons.

In most cases any evidence destroyed is captured either with photographs or on video. In some areas destruction orders specifically require this process.

There have been instances where requests for independent examinations have been made only to find those samples have been destroyed, evaporated or are in a condition that does not render themselves to this process. This becomes a battle for you and can affect the opinion of your expert.

I would suggest you obtain testimony regarding the law enforcement agencies procedures followed regarding clandestine lab evidence. If there is any deviation from the established policies, there may be cause to bring this to the attention of the court.

Fingerprints and Other Evidential Considerations

We have already discussed this in previous sections but as a former certified instructor, I would stress to law enforcement officers the need to conduct any examination, such as fingerprints, to attempt to show exclusive possession. In some instances the items are printed prior to destruction. In most no fingerprinting is conducted.

It can be difficult to bring this out during trial. In some states the defense cannot bring out these types of issues unless the door is opened. I was subpoenaed to a trial where my testimony was solely related to items of evidence, such as gas cylinders etc could be printed. The prosecution filed a motion in limine and was successful in keeping that testimony out. None of the investigators opened the door allowing this testimony in.

If there is evidence that has been collected which does render itself to fingerprinting which the law enforcement officers failed to do, you can file a motion with the court and have this done for you. In most instances, the seizing officers wear gloves and would not deposit new prints, but they could have destroyed existing prints. If there are plastic bags of meth or other critical

evidence which your client categorically denies he or she ever handled, I would recommend this process be undertaken.

If prints are developed and none are associated with your client, you now have something to talk about.

Latent print processing could be conducted on the jars and box.

In some instances investigators will find various documents purported to show the drug activity/accounting of the defendant. This makes for some potentially strong evidence.

What generally does not occur is the state having the documents examined for handwriting comparisons. The prosecutor can talk all day long about these documents, but if they cannot be tied to your client via this method, is this evidence pertinent?

The other factor about handwriting you should be aware of involves those undated documents. In Missouri there is case law, State vs. George Revelle which addresses the admissibility of undated documents.

Another item of evidence which generally cannot be examined, but is often critical in these cases involves knowledge necessary to manufacture Meth. There have been many cases filed in which the state has no evidence the defendant had the knowledge or the means to manufacture the drug. This is a very important issue when there is not a great deal of meth related paraphernalia present.

Since many charges bear the wording "with the intent to manufacture" the state should be required to demonstrate the knowledge, means or the ability for a person to consummate the synthesis process. I have heard of several frustrated investigators who attempted to get this information in through previous knowledge, prior CI information and other hearsay testimony.

In those instances where the attorney was paying attention, this type of information did not come into evidence, especially those instances of uncharged criminal acts.

Bench Notes

These are the notes, charts, data etc. prepared by a forensic chemist and relate to the examination of the substances. They will record preliminary color tests and the equipment used to conduct the analysis. Most drugs are currently analyzed with the use of a Gas Chromatography/Mass Spectrometer providing positive identification for the substance. Infrared Spectroscopy is also used and it will again positively identify the drug in question.

The most beneficial of the notes are the charts from the instrumental analysis. Mass Spec charts will not only provide information on the controlled substance, but other compounds contained in the drug as well.

This type of information is not routinely part of discovery. To obtain this information requires cooperation with the prosecutor or a "ductus tecum" subpoena. I would recommend on those cases where you anticipate deposing the analyst, you obtain these notes prior to the deposition. You can accomplish this by issuing the subpoena to the custodian of records of the lab. They will generally bring the case file or the items specified to the indicated location. You may have to be prepared to conduct a short deposition along the lines they are the custodian of records and the items they brought with them constitute the notes etc from the case. While the deposition is occurring, your copier can be busy.

In some instances the state can assist in obtaining these records, but most generally I find the tendency to argue they may not be discoverable. Any item, note, chart etc., used by the analyst in the formation of their opinion is discoverable.

I have found, for example, if you request the "bench notes" from some DEA labs; that is what you will get, the hand written notes of the analyst. You may not get the charts etc showing the instrumentational data. These labs do not consider this information as discoverable and will only give them up after a fight.

You can have these items reviewed prior to the deposition and your expert can provide you with a list of suggested questions. These types of depositions are more focused than the ones I have been subjected to, the "what did you do then." style.

You can also consider obtaining the maintenance and run logs for the instrument used in the analysis. Part of the quality control programs in most labs includes these records. The reason I bring these up relates not to a meth lab case, but one in which methamphetamine was identified via Mass Spectroscopy. Reviewing the run log found an entry labeled "blank". The adjoining column labeled result read "cholesterol." This indicated a problem with the

instrument which the analyst did not investigate. The actual samples were analyzed right after this entry and were eventually suppressed.

Bench notes can be extremely beneficial to understanding the case. Many labs will only identify controlled substances and precursors. From the review of the bench notes, you may be able to determine the Method used, establish a link between samples, establish a lack of commonality between samples and potentially identify precursor source.

If you obtain these notes, I would encourage you to have them reviewed by a competent expert.

Field Test Kits

You will frequently encounter these by law enforcement officials in cases where powders are found. Ephedrine/Pseudoephedrine do not give the same test result as meth. There is a separate test available for PSE/Ephedrine called the "Chen's Test."

The key to this issue comes when you compare the results of the field test kits with the analytical results. If a sample is found to be Ephedrine/Pseudoephedrine and the investigator indicates a positive field test for meth, there is something wrong as these two do not produce the same result.

This relative insignificant issue was the means by which a search warrant was obtained. The investigator received knowledge from a confidential information meth was being cooked at a certain residence. The CI provided the investigator with a reported sample of that meth and upon field testing the investigator reported it was positive for meth. On to the judge for the search warrant which was served a short time later.

No active lab was found and, as a matter of fact, there were items which could be used in a meth Lab, but no meth powder was found. The defendant was charged on the basis of the CI information and the powder.

Lab results indicated the powder was ephedrine, not meth. A motion to suppress hearing was held where the investigator testified to his training and experience with field test kits and a positive test for meth was an orange to brown color. He was unable to testify as to the discrepancy between the field test kit and the lab analysis.

The defense attorney had the investigator conduct an in-court field test on the substance from the CI. It did not turn orange to brown and since the investigator used the field test result and "exigent circumstances" claim in obtaining the warrant, the judge threw the evidence out.

Field test kits have a use in law enforcement but again they can be misinterpreted. Some agencies log these test kits into evidence. I can guarantee by the time you look at the evidence, the solution will have turned black. This is normal, but does cause some investigators to get nervous.

Investigator Testimony

This is an area where the attorney must be on guard. To many investigators any item is related to a meth lab and the use of "literary licensing" can be pronounced.

The first issue relating to investigator testimony comes in the area of training in the area of clandestine labs. Many investigators will write the significance of evidence based on their education, training and experience. On this basis much of their testimony is allowed and I have reviewed Court of Appeals decisions that heavily relied on the information provided by police.

If you have an investigator who claims to have some form of training, dig into the issue a little deeper. Try to obtain course outlines, syllabuses, manuals etc to gauge the depth of the training. In a Southwest Missouri case a Sheriff's Deputy claimed to have a 40 hour programs

offered at the Highway Patrol. A review of this course found very little dealing with the topic of meth synthesis methods. More coverage was given to safety considerations, investigative techniques and use of informants. One part of the training specifically stated if there was some chemical or methodology questions a forensic chemist should be contacted.

Most investigators should not be allowed to testify as to the ability of a particular lab to produce meth. There are cases where these investigators opined the lab could produce meth even though the lithium and anhydrous ammonia were missing. This testimony went unchallenged! Once an investigator is allowed to testify as an "expert" in the area of clandestine labs, he or she is harder to challenge the next go 'round.

I recently reviewed the preliminary hearing of a Kansas investigator who claimed to have 40 hours in clandestine lab training. What I believe he attended was the session mainly dealing with the "clean up" of these scenes and this was supported by his unfamiliarity of the Lithium/Anhydrous Ammonia Method. A point to remember is if this goes unchallenged and the case is later reviewed by the Court of Appeals, the only information presented to them is from the officer.

Questions have been raised whether a law enforcement officer with 40 hours of training or so in the area of meth labs should be considered an "expert." Some attorneys have challenged the expert role when they find the investigator has no chemistry background or never had a chemistry course and yet they still attempt to testify as to the synthesis of meth. These same attorneys have been successful in getting some of these investigators to agree that they are regurgitating the information they have received in training and have never done any independent studies or research on their own. This type of testimony is more of a "technician" mode than expert. Remember hospitals employ "med techs" who are trained to run specific tests or series of tests but are not considered experts.

The impact on a jury by investigator testimony is pronounced. Remember, law enforcement has been successful, and in some instances rightfully so, in alarming the public to any unusual odor or behavior on the part of their neighbors. Some of this information has gone so far as to have some people believe a cataclysmic explosion due to a meth lab could erase their neighborhoods.

My suggestion for dealing with law enforcement is simple, as it is on other cases, deal with the evidence found. I have never found anyone who can reliably predict the actions or behaviors of others so if precursors are not found, they were not found and any significance or potential to this is irrelevant and speculative. A good meth lab case is stand alone, it has the evidence to demonstrate exactly what was going on there without the need for interpretation.

I also suggest you watch for "interpreting negative evidence". By this I mean explaining the lack of evidence found at a scene. Let me give you an example; in a recent federal case, law enforcement detected an odor of ether as they drove by. Two hours later they served the warrant and found no evidence of a meth lab. It was their opinion that the meth lab had been dismantled in that two hours. This opinion was based upon an assumption, not provable fact.

Finally, I do not want anyone to believe I am against law enforcement investigating meth labs. I have encountered a large number of officers who offer very sound opinions and do their job in a professional manner. It is the small percentage of investigators who become enamored with themselves and their so called expertise that causes problems for the rest. If you are reading a case and the officer explains everything and uses "in my education, training and experience" in just about every sentence, you have someone to pay attention to.

21 § 858

Endangering Human Life While Illegally Manufacturing A Controlled Substance

> "Whoever, while manufacturing a controlled substance in violation of this subchapter, or attempting to do so, or transporting or causing to be transported materials, including chemicals, to do so, creates a substantial risk of harm to human life shall be fined in accordance with Title 18, or imprisoned not more than 10 years or both."

Clandestine Labs are dangerous in many ways and the risks to the cookers and others can be substantial. This charge can result in the necessity of a "safety assessment". In this process, the expert will examine the scene paying close attention to those items that are hazardous or dangerous such as the chemicals. He or she should also consider weather conditions, ventilation and the overall lab site.

There is no definitive means to appraise the particular site. Each site is different, therefore close attention should be paid to photographic and videotapes. You might also be aware that in some instances, law enforcement will bring a "Volatile Organic Vapor" detector to the scene to check the air quality. Most often the results of this test are negative.

To make the case the government will rely on their expert, often a trained law enforcement officer with little if any chemistry background. If this is the situation you find yourself in, I would recommend you consider having an expert guide you through this process.

Outside Testing

As a general rule I do not encourage the use of outside testing on drug samples. I have found this usually gives the government two expert witnesses. If there is some claim the substance was not the drug identified, or if there is some other need or compelling issue, such as quantitation, then outside testing should be considered. I will let you know this is not an inexpensive undertaking..

It is also hard to keep the government from knowing you are testing the samples. I like to require court orders for retests. Why? If I am stopped by law enforcement with drugs in my car on the way to conduct the analysis I have a document to show I am in possession of the substances on the order of a court. I did one case by agreement and developed an ulcer with over 25 grams of meth in the car. The analysis was conducted over a weekend and I am sure both prosecutor and defense attorney were off somewhere and could not have been reached.

Another issue regarding outside testing, which really isn't an issue except for Springfield U.S. District Courts is whether your chemist is certified by the DEA to conduct the examination. All forensic labs have a DEA certification which allows them to purchase controlled substances as standards. The analysts themselves are not certified. In Springfield, the U.S. attorneys claim they cannot release any substance to someone without this certification.

I recently conducted a re-analysis out of the Kansas City Federal District Courts. The DEA agent met me at the KCPD evidence room, signed all the evidence out to me and off I went.

Another issue deals with the various law enforcement agencies reluctance to turn over drug evidence regardless of a court order. Some courts have taken the stance to order the retesting but allow the agency or analyst to be present during this testing.

My attitude towards this concept is not good. Twice I have been required to schedule my time, the lab time and the lab analyst's time. After two cancellations I was forced to go to the attorney and the courts as time was drawing near to the court date.

The other aspect to this process of including the analyst or officer at the time of retest is they are getting "privileged" information. You are allowed to prepare your case and not disclose the results of your case preparation. In this light, the re-analysis can be construed as part of your case preparation. If you can have the samples re-run by your analyst without the participation and presence of the state you can reach your decision about whether to use your expert or not without the knowledge of the prosecutor.

Many attorneys use the services of academic based professors in the retesting of samples. This can be very beneficial to your cause however, many university professors know and understand little about the law and may be more than willing to discuss with whomever is present the tests and results they have conducted.

Case Reviews

A case review is a process by which the discovery material is forward to me. Based on the information contained, including investigator reports, lab reports, evidence listings etc, I provide information on the case. These reviews are based on my education, training and experience as both a forensic analyst and a private consultant who has reviewed over one hundred and fifty lab cases.

This review is objective meaning you will get unbiased information. If the evidence in your case strongly supports meth synthesis, you will be told so. If there is evidence such as missing essential chemicals etc., you will also be informed of this. The examples listed in this document are based on review results.

The reviews form the basis of potential testimony or to act as your expert in a non-testimonial manner. This includes reviewing the documentation, creating an evidence listing with analytical results on larger cases and a work product memo (if desired) or telephonic conferences. If there is the need to view the evidence, this would be charged at the normal travel/hourly rate.

If called to testify, we will decide what, if any, demonstrative evidence is needed for the presentation in court and the approximate cost of this preparation. I am a firm believer in demonstrative evidence especially during jury trials. I have taken about 20+ college hours in education as well as 18 graduate level education courses. These have provided me with a background on the best means of presenting scientific evidence to jury panels.

You as the trial attorney must decide which of your cases merit reviews. There is no single or multiple issues that can be used to make this decision. If there is a question, I would

encourage you to contact me. Many times we can discuss the case on the phone and give you an idea of how to proceed.

For a complete review, the following documents should be obtained:

1. Police Reports
2. Lab Reports
3. Bench Notes
4. Photographs.
5. Videos
6. Witness statements
7. Defendant/Co-defendant statements
8. Pre-Sentence Investigation Reports
9. Previous testimonies/depositions

One final comment on case reviews, you don't always get what you expected. What this means is you might find the review revealed a different path than originally discussed. For example, a case from Oregon dealt with theoretical issues. The result of the review indicated a real issue of knowledge and function of the defendant. In this case the defendant was more like a "mule" than an active participant. The resulting investigation on the part of the attorney and his investigator, coupled with a review of the evidence resulted in a six step downward departure on this case.

Experts

It is not possible to define what cases merit review by experts. I have been sent what appeared to be cut and dry cases only to find several holes or inaccuracies in the reporting and the evidence. I have also been forwarded cases where the government failed to use samples in their theoretical yield calculations. What I usually tell attorneys is if you have a case where something appears to be unusual or something you haven't seen before, have the case reviewed.

It is sometimes a mistake to view expert participation as "testimonial" in nature. An expert can be invaluable in educating you in the methodology, explaining what was found at the scene and how it relates to the charge and he or she can assist in the preparation of cross examination questions for not only the forensic personnel, but the investigators as well. Here are some things you can consider when contemplating the use of an expert.

"What type of expert do I need?"

Many attorneys use academic based experts who understand the synthesis process like the back of their hand. They can afford testimony regarding the reaction and the production of meth. Other attorneys use more forensic based experts. This person may have prior crime laboratory analytical experience that can afford insight into the composition of methamphetamine as found in the drug culture.

"Is there a specific function to be achieved, or do I need to look at the broad picture?"

This question raises the issue of what you attempting to accomplish and is the most difficult one to answer. The case may appear to deal only in the area of theoretical yields and you may need an expert for this function. There are also those cases where the entire scene and evidence should be examined prior to any theoretical yield issues.

Do you wish for your expert to have contact with your client?

This is a particular touchy issue especially if the case will go to trial. Information supplied by your client to your expert is not always considered privileged information and any admissions, procedures used, recipe etc. can be admitted at trial if your expert is so questioned. This type of information can be of vital importance to the work of your expert, but with it comes serious implications that should be studied and evaluated prior to any contact.

What is the testimonial style you wish to present?

There are attorneys who wish to present "scholarly" testimony to prove their point. There are attorneys who wish to present their material in a manner that promotes scholarly, yet understandable testimony. Communication is often the key element in presenting a case. Whatever testimonial style is your preference, I would strongly urge you to have your expert prepare demonstrative aids or PowerPoint presentations to demonstrate their knowledge of the subject and case specific photos or charts to demonstrate their opinion.

What knowledge base of sentencing guidelines do you wish your expert to have?

Knowledge of sentencing guidelines is not a prerequisite for an expert conducting theoretical yield analysis. Objectivity on the part of your expert can be a key in making a believable presentation to the court. Should the government be able to extract from your expert a specific knowledge of sentencing guidelines, his or her testimony can be perceived as a "playing the numbers games" in an effort to achieve a reduced sentence.

Attorney recommendations are often a good source of finding your expert. The most important thing you should hear is that expert was thorough and professional. A red flag can be any statement regarding the ability of any expert to achieve a desired result. You should also inquire about the number of times and locations a particular expert has testified regarding these cases. An unusually high number of appearances versus cases received can be perceived as a "hired gun" or "have expert will travel."

The role of the expert is to advise you of the results of his or her examination. If the expert's opinion benefits your case, he or she will be called to testify. If the expert cannot add testimonial evidence, he or she may be able to assist you in the cross examination of government's experts or law enforcement officials.

The final comment regarding the nature of experts comes in their fees. Some experts will charge for their exam time and then charge flat fees for court appearances. Others will charge the same fee for both examination and court time. There are pros and cons to each of these, but what can generally be said is whatever the fees, they seem to find their way into testimony.

Summary

This document covered the basics of clandestine meth lab investigation. Each case should be handled on its own merits and quite often I find there are new things found which can have an impact on the overall impression and opinions on the case.

Like most facets on the "War on Drugs" I anticipate the funds for these cases will either slowly dry up or be diverted to something new and fascinating. There already is a tendency to handle meth lab case investigations in a similar fashion to accidents and other "routine" investigations. These are anything but routine.

The number of cases involving multiple defendants has also been on the rise. Very often this places the attorney in the position of having to prepare the case not only from the forensic and lab related evidence to what the co-defendant has to say. Evidential related matters can assist your preparation from the standpoint these statements can be substantiated or rebutted. Unfortunately it appears most of the co-defendants in cases who offer testimony are either the cook or someone else with immense knowledge of the operation.

Meth lab cases also seem to underplay the role of the forensic sciences. Most often the testimony of the analyst is kept to the results of their testing only and it is difficult to ask any questions that will relate back to the site itself. Most forensic personnel have no knowledge of the scene or the totality of the evidence, therefore the investigator plays the key role in educating the court and the jury into the lab's nature, sophistication and ability to produce a product.

It is my opinion, clandestine meth lab cases remain as complex in preparation as other felonies like assaults and murders. The assistance of an expert can be an invaluable tool in determining the direction of your case.

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Theoretical Yields

Introduction

The investigation of clandestine Meth labs continues to be an ongoing and evolving process. Very often each new case submitted provides different and unique evidences or situations to the attorney.

The document explores some of the legal and scientific basis for theoretical yields. While this document is not meant as a legal or scientific treatise, it is prepared to assist in the understanding of lab capacity or theoretical yields and their associated issues. This document will also provide a few examples in an attempt to demonstrate the uniqueness of each case and they means by which they can, or cannot, be estimated.

Before we get started, let's explore some of the pertinent case law as it relates to Methamphetamine Laboratory Theoretical Yields.

The government has the burden of proving by a preponderance of the evidence the amount of drugs for which a defendant is accountable. (*Walton*, 908 F.2d. at 1302, *Clemons*, 999F.2d. at 156).

Part 1 – Clandestine Labs

Before any discussion on theoretical yields can begin, it is important to understand the concept of clandestine laboratories. Clandestine labs are generally the production site of illicit controlled substances. The complexity of these sites varies tremendously across the nation ranging from large scale, well-organized operations to those found in small outbuildings or residential garages.

The background of most "cookers" includes very little to no training in chemistry and a strong reliance on "cookbook" methods obtained via various publications or the Internet. Most of their knowledge comes from "on the job" training in the actual synthesis of the drug.

Today's synthesis methods are less complex than those found in the clandestine labs of the 1970's or 1980's. Many of the materials can be purchased as over the counter cold medications and hardware store items. Very little in the area of specialized chemicals or supplies are required.

There also exists a wide variety of "recipes" available to cooks and potential cooks. Within each synthesis method the ratio of precursor material to essential chemicals can directly affect the resultant product.

What is common to the Hydriodic Acid/Red Phosphorus and the Anhydrous cook method is the requirement for the extraction of the Ephedrine/Pseudoephedrine prior to synthesis. Like the actual synthesis process, there exists a wide variety of extraction processes which can affect the overall production and quality of Meth.

Part 2 – Factors Affecting Methamphetamine Synthesis Theoretical Yields

Let's turn our attention to some factors in the calculation of theoretical yields. Each one of these can, and do, have an effect on the overall capability and quantity of Meth produced.

- ✓ Knowledge of cooker
- ✓ Experience of the cooker
- ✓ Synthesis Method
- ✓ Recipe Used
- ✓ Specialized Equipment
- ✓ Precursor Material
- ✓ Precursor Extraction
- ✓ Sources of Red P
- ✓ Concentration of Red P
- ✓ Iodine Source
- ✓ Anhydrous Ammonia
- ✓ Lithium Source
- ✓ Lithium/Precursor Ratio
- ✓ Salt Formation
- ✓ Final Extraction

These factors should not be ignored in the preparation of theoretical yields examinations. It is incumbent upon the expert to be aware of these factors and bring them to the attention of the attorney. As previously stated, while most of these cannot be quantitated, they can and should be noted in any "Report of Examination" to assist the court in its determination.

Part 3 – Precursor Material

The most common means of determining theoretical yields are by:

1. Actual precursor material present
2. Receipts for precursor material
3. Testimony of witness regarding amounts of precursor
4. Statements of defendants.

The calculation of precursor material is often based upon pills/tablets and/or blister packs, both empty and full found at the scene. This is an arithmetic calculation and is exampled below:

$$\frac{\text{Molecular Weight Methamphetamine (Hcl)}}{\text{Molecular Weight of Precursor}} = \text{Conversion Factor}$$

Example

$$\frac{\text{M.W. Methamphetamine} = 185}{\text{M.W. Ephedrine} = 201} = 0.92$$

Therefore 1 gram of Ephedrine will yield 0.92 grams of Meth

Basically to arrive at a theoretical yield based upon amounts of precursor you would take the total weight of precursor in the pills and multiply it by the number of pills. Take this value and multiply by 0.92 and you get the weight of Methamphetamine at 100% Yield

It is this calculation that aided in United States v. Eschman 227 F.3d. 886 (7th Circuit, 2000). In this case the court found that the sentence lacked an evidentiary basis where it was solely based on the 100% theoretical yield "Both parties experts testified that a 100% yield is merely theoretical.

Let me distinguish between 1:1 Conversion versus 100% Yield. These have been a source of misunderstanding.

The 1:1 Conversion concept means 1 gram of precursor is converted to 1 gram of Methamphetamine. The above calculations explain this.

The 100% Yield concept means all of the precursor in a reaction mixture is converted to Methamphetamine. If you refer to the section dealing with factors that can affect the conversion, you will see the 100% is theoretical in nature only.

Part 4 – Extraction of Precursor

The most common form of precursor comes in over the counter medication. There are a wide variety of forms that contain Pseudoephedrine/Ephedrine. In addition to the active ingredients, these pharmaceutical preps contain other ingredients that can affect the reaction. Shown below is the information contained on a box of Sudafed 12 Hour Cold tablets.

> **ACTIVE INGREDIENT:** Each coated extended-release tablet contains Pseudoephedrine Hydrochloride 120 mg.
>
> **INACTIVE INGREDIENTS:** Carnauba Wax, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Polyethylene Glycol, Povidone, and Titanium Dioxide. Printed with edible blue ink.

Take a look at the inactive ingredients. From this you will see the drug manufacturers have made an attempt to diminish the ability to clandestine cookers to easily use their product.

These inactive ingredients must be removed from the Ephedrine/Pseudoephedrine before it can be used to create Meth. In both the Hydriodic Acid and Anhydrous methods, the presence of these ingredients will affect the synthesis.

Almost every theoretical yield I have encountered where cold tablets were used, they always use the dosage weight of the Pseudoephedrine such as 25, 30, 60, 120 and 240 milligrams. While this is the labeled amount, rarely will the tablets contain this weight.

In addition to this, the Pseudoephedrine in these tablets must be extracted from the other substances. Any extraction is not going to be 100%. This means that using the dosage weight of the precursor will result in a high estimated yield. I conducted a preliminary study on the extraction percentages of precursor and found an average extraction yield of 70%.

Recently a case was submitted from the Northwest in which the expert provided a theoretical yield estimate of 200 grams of meth. Using the weights of the precursor, the defense submitted their own yield estimate of 133 grams utilizing the precursor extraction rate of 70%, the conversion factor and an conversion rate of 50%.

The government and their chemist decided to conduct an analysis to determine their own extraction yield and to synthesize meth using the same method found in the case. Their

precursor extraction rate as determined to be 77%. After the synthesis, they offered a second theoretical yield opinion of 137 grams of meth.

The interesting outcomes of the government's "experiment" were:

1. There was less than a 4% difference between the government's second and the defense's theoretical yield estimate.
2. If one conducted the calculations using the reported 77% precursor extraction rate, the estimate should have been 146 grams of meth at a 50% conversion.
3. If this 77% precursor extraction rate is correct, the actual conversion of precursor to meth was less than 50%.

Part 5 - Theoretical Yield Estimations Involving Essential Chemicals

Every now and then I will hear of a theoretical yield in which the government's chemist based their opinion on the amount of essential chemicals. The courts have ruled this is permissible, but there is a stipulation you should be aware of.

The one instance I reviewed a theoretical yield report based upon the amount of iodine, I found error with this basis of this calculation. I found no evidence in the case where the specific formula or synthesis means was found. The chemist rendered their opinion based upon an average or collage of the various formulas they have knowledge of.

Using the "collage" theory allows for the theoretical yield based upon 10 lithium batteries or finding so much anhydrous ammonia at a scene. While this sounds logical and scientific, I believe the use of secondary precursors should be relegated only to those cases where a specific formula was found.

For example, the common means of preparing hydriodic acid includes adding 300 grams of iodine crystals to 50 grams of red phosphorus suspended in 300 mi of water. This is a general formula, but is it the one used at that particular scene? If not, the theoretical yield could be affected.

The courts have held in U.S. v. Mahaffey, 53 F.3d, 128 "The court must take into account the capacity of a particular homemade laboratories, the recipe used and the skills and experiences of the particular cook who processed each batch.

When encountering theoretical yields based upon essential chemicals, you should inquire about the basis for the estimate and if there is any relation of that basis to the scene at hand.

I also want to comment on a recent find. Reportedly a theoretical yield was based upon the amount of Freon. Freon is not an essential chemical, it is a post synthesis extraction solvent. The amount of Freon has no bearing on the amount of Methamphetamine produced according to all the research I have found and conducted.

Part 6 – Theoretical Yield Involving Multiple Methods

The sign of a case that is not going well is one where there is evidence from two different methods found at the scene. For example, evidence from a lab scene includes a propane tank with a bluish/green discoloration, blister packs of ephedrine/pseudoephedrine and a bag of red phosphorus or a bottle of iodine.

In most instances the theoretical yield report will include calculations for both the hydriodic acid and anhydrous cook method and I am willing to bet the government will opt for the one that is higher.

In an instance like this, your expert needs to take a close look at the evidence and the analytical data. This will involve obtaining the analytical charts, data, etc. from the chemist in the case or having the samples re-analyzed. What the expert will be looking for is evidence of which method was used.

If the expert finds iodoephedrine in the samples, this would be evidence of the Hydriodic Acid synthesis was employed. If your expert finds the presence of "CMP" this would be evidence of the anhydrous cook method. It could be possible to eliminate a method through chemical analysis and/or review of past analyses. This, in turn, provides the testimony to the court as to why a method should be excluded from consideration.

Part 7 – Theoretical Yields from Witness Testimony

This is a relatively new addition to the determination of theoretical yields. The Government takes statements of those willing to testify. Most often these will relate to the frequency of cooks, how long the cooks have occurred and the approximate quantity of the cook. This information is vague and very often cannot be substantiated by the evidence. These yields also render extremely high numbers.

When dealing with these situations, a thorough examination of the statements is required. For example, in one case the witness - the actual cook - testified to the months the operation was

going on, how often it occurred and the yield of each cook. Also included in his statement was the recipe.

When the recipe was used to calculate theoretical yields based upon his frequency and length of time, the calculation went from around 10 kilograms to 1.3 kilograms.

In cases where no recipe is found, a thorough examination of the evidence may be beneficial in noting discrepancies in the witness statements.

Part 8 - Theoretical Yields from "Tailings"

"Tailings" refers to the left overs, if you will, from the extraction of the pseudoephedrine. This material contains pseudoephedrine and the "inert ingredients" from the tablets. From the amounts of tailings a chemist estimates the number of pills that it would take to produce that amount. Once the number of pills is estimated, he or she will determine how much of the total pill's weight the pseudoephedrine would be and then use that calculation to determine the weight of the precursor. From that, in theory, one can estimate the amount of meth.

The most important concept to understand regarding the use of tailings is that the process is a "retrograde" extrapolation, one that goes backwards. Confused? Let me try to explain. If you know the number of pills, you can estimate the amount of meth. In essence you are going from precursor to product, in a forward direction. With tailings you have to determine the weight of the precursor, from junk to pills to amounts of precursor. This is the reverse process.

Retrograde extrapolations are fraught with assumptions. Here are some of the assumptions that may be used in estimation of yield from tailings:

1. The tailings are the same as any precursor found at the scene. With this assumption, the chemist is attempting to demonstrate the evidence of precursor, blister packs, boxes or actual pills, are the same as and produced the tailings. I don't believe there is a significant difference in tailings composition product to product and this first assumption could be in error affecting the rest of the calculations.
2. The weight of the pseudeoephedrine as it relates to the total weight of the pill or tablet. Let's say the total weight of the pill is 0.3 grams. If the weight of the precursor in that pill is 30 milligrams, then 10% of the weight of the pill is precursor. This again goes back to the first assumption, attempting to identify precursor material.
3. Residual pseudoephedrine. The chemist does not usually subtract the weight of the remaining precursor found in the tailings. This will increase the yield estimate

because they are assuming a dosage amount plus the weight of any pseudoephedrine found in the tailings.

4. Condition of the tailings. In some instances, the tailings will be found in a wet, moist or damp condition. This was the case in a submission from the northwest. If the tailings are moist by the time they are analyzed, they will be dry as the solvent will evaporate. This dictates the need for the sample to be weighed at the time of collection to determine the moisture content should the tailings dry prior to analysis.

With the restrictions placed upon the purchasing of over the counter medications the use of the same brand of pseudoephedrine at clandestine meth lab scenes is rare. Very often you will find evidence of two or three different OTC present and some of these will vary in amounts of precursor.

Meth cooks are notoriously messy, disposing of little from their cooks. Many will keep jars of extracted meth around just in case they need a fix and don't have time or materials to cook. They will also keep the tailings around just in case they need a little "left over" pseudoephedrine for a cook. These samples could be a tremendous source of error.

The use of tailings could also be "double dipping" if there was evidence of precursor which was used to calculate a theoretical yield and the chemist opts to include the tailings as well. The estimate could be doubled as they are calculating based upon the evidence of pills and the extraction residue remaining from these sample pills.

If you encounter any estimation from tailings I would strongly urge you to obtain expert assistance. The review of this material can be very confusing and replete with assumptions that will only inflate the numbers.

Part 9 – Drug Purity

This is another concept that can be misunderstood, especially when the defendant is charged with manufacturing a given amount of a mixture containing Methamphetamine.

When dealing with the term "mixture" the Government is often citing the gross weight of a powder. They are not citing the composition of the powder, just its weight.

When dealing with the term "actual" Meth, the Government is stating there is "X" amount of pure Methamphetamine in the samples.

To determine the "actual" weight of Meth, a laboratory must conduct a quantitative analysis. In this examination the purity of the drug is determined. Once the purity is determined, you would multiply this value time the gross weight. This results in the weight of pure drug.

The DEA labs routinely quantitate drug submissions. I have reviewed many cases and found the results to have been accurately reported. State and local labs, however, do not routinely conduct these examinations on drug samples and therefore the results should be reviewed.

A review of a case in Nevada found clandestine lab Meth with purities in the 90+% range. This was found on three cases. The review found deficiencies in the analytical and calculations process.

DEA's own website reports "The average purity of Methamphetamine exhibits seized by DEA dropped from 71.9% in 1994 to 30.7% in 1999. The average purity of Methamphetamine seized by DEA in 200 rose slightly to 35.3% .(http://www.usdoj.gov/dea/pubs/intel/01020/index.html, page 11 of 17).

Part 10 – Mixture and Substance Issues

Many years ago during my time as a forensic analyst, the most dreaded cases drug received were those that were going federal. That meant not only did we have to conduct the regular examinations, we also had to quantitate or determine purity. Over the course of time, those quantitative values began to show the purity of clandestine lab produced methamphetamine was poor. The DEA reports the average purity of meth from clandestine lab seizures in 1999 was 30.7%. This rose to 35.3% in 2000 and continued its upward trend to an average of 40.1% in 2001. At a time where sentencing was based upon "actual" meth, the low purity levels were an important factor.

About this same time the 100% conversion theoretical yield theory promoted by the government began to be challenged. Defense attorneys were employing their own experts to look at not only lab capacity but the various conversion rates for the synthesis methods. The Iowa Study provided a great boost to those who claimed 100% conversion was theoretical in nature only and shifted the means even government labs approached this issue. The trend became one of lower sentencing levels when you looked at actual meth and the less than 100% conversion.

Slowly and rather quietly, the number of state and local lab cases conducting routine quantitation began to dwindle. All that was reported was the qualitative or identification results and the government was forced to either make the specific request for purity testing or find some other means to sentence clandestine lab defendants. That appeared to be the onset of "mixture and substance" issues.

So what is a "mixture and substance?" Basically any powder, paste or liquid that contained a "detectable" amount of meth could be deemed a mixture and substance. Since the word "detectable" was present, this meant any sample that contained even the lowest amounts of meth fell into this category. Those familiar with modern instrumentation would know today's forensic chemist is capable of detecting substances in the nanogram range or one millionth of a gram.

No longer is the amount of actual meth important, it is now the gross weight of the samples that comes into play during sentencing. Mixture and substance cases can dictate a different approach to case preparation. For example, could the sample be construed as "waste water" or "waste products" from the clandestine manufacture of controlled substances? Is the amount of meth so small that it can be deemed insignificant?

In this paper we will take a look at the implications of mixture and substance cases, how the attorney can prepare and what information is available to assist in this preparation.

From the standpoint of the evidence, most samples come in the form of powders, powdery residues and liquid samples. It is the samples of significant weight that are important under the mixture and substance issues. I also want to state that sentencing under this guideline is not always bad, in many instances it might be beneficial to your client to have this potential, so lets start our discussion by taking a look at powders.

Part 10 – Mixture and Substance Issues – Powders

The initial impression is that using the gross weight of a powder promotes excessive sentencing levels. This can be true, however, there are instances where it can actually benefit the client. Let's assume your client had 300 grams of powder that was found to contain methamphetamine. The mixture and substance sentencing level would be level 28.

You are concerned that this level could be high, so you opt to have your own chemist conduct a retest on the substance which results in a determination the powder is 60% pure. That means the amount of actual meth is 180 grams which is a level 34. In this instance, the mixture and substance sentencing guidelines is better for your client.

Powders that have a very low concentration of meth are where the mixture and substance notion can be detrimental. Using the above example, let's assume instead of 60% purity, the lab found less than 2%. That would make the "actual" meth around 6 grams, which makes it a Level 26.

Part 10 – Mixture and Substance Issues – Liquids

The greatest implication of mixture and substance comes for liquid samples. It is not uncommon to find liquid samples at clandestine lab sites. Very often these are found in quart jars of varying volume. During the investigation, law enforcement will take samples and forward them to the lab. During the analytical process, the chemist will determine the weight of the liquid, identify the substances within and, in some instances, apply the weight of the sample to the whole. This can result in some hellacious high weights.

Most of the time the liquid is these samples is some solvent and/or has a low pH. The nature of the solvent varies, but can be Acetone, Coleman Fuel and others. Clearly the ingestion of these solvents is injurious to the body, but the liquid is a mixture and substance containing meth and it is the weight of this harmful substance that is being used to assess the sentencing level.

Part 10 – Mixture and Substance Issues
Application Note 1 – §2D1.1 – Guidelines Manual

Application Note 1 found in §2D1.1(c) states: "...Mixture and substance does not include materials that must be separated from the controlled substance before the controlled substance can be used." Later in that same Application Note the following is found: "Examples of such materials include..... waste water from an illicit laboratory used to manufacture a controlled substance"

I make no claim to be an "expert" on setting guidelines, that's your job. If you are opting to use an argument based upon this application note, you will need your expert to understand what you are attempting to show. He or she must be prepared to assist in explaining to the court the ramification of the ingestion of methanol, acetone or other solvents. It will be your expert's call as to whether the sample is consistent with "waste water".

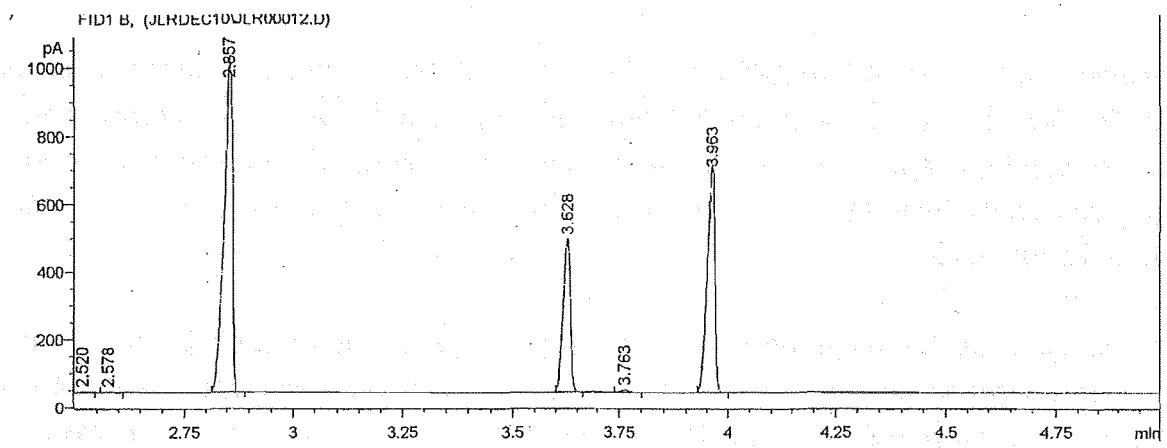
In preparing for these seminars I ran into case law from several years ago that states something to the effect when the defense challenges the theoretical yield, the burden of proof shifts to them. Sorry, couldn't find the site, but it is really irrelevant in that most cases the burden shifts to you anyway.

The final sentence in Application Note 1 states: "If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted." The door has been opened, now what can you do to prepare? The first course of action is a review of the bench notes.

Part 10 - Mixture and Substance Issues - Bench Notes

Bench notes, for those of you who are unaware, are required on all examinations forensic scientists perform. In the area of drug/clandestine lab analysis, the bench notes will include the analyst's hand written notes in which they describe the samples, how they were packaged etc. From there the bench notes will contain information as to the tests conducted, for example, they will show the weight, the color tests performed and other tests. The bench notes will also contain the instrumentational analytical data, such as charts from Mass Spectral Analysis.

The instrumentational printouts can afford an idea of the relative quantities of the organic substances detected. Not only will these data charts reveal the presence of the meth, it can also show any pseudoephedrine or other compounds found in these over the counter cold preps. From the data found on these charts, an experienced analyst can render some general opinions on the sample. Let's look at an example:



The above chart is data from a gas chromatograph/mass spectrometer. What it shows is the compounds found in a sample. The data goes left to right and the numbers at the bottom are time.

The first peak shown around 2.8 minutes is the "internal standard" a reference compound that is generally present to show reproducibility. The middle compound is methamphetamine, the last pseudoephedrine. Using a technique referred to as "peak area" an analyst can determine the areas under the peaks, add the areas of all the peaks and then make some general statements regarding the sample.

In this example, the total area of all data peaks is 6.18 cm^2. The area of the methamphetamine peak is 2.1 cm^2. This indicates of the known data present on the printout, methamphetamine composes a maximum 34% of the total area. If meth is found to be approximately 34%, then this percentage could be applied to the total weight of the powder or liquid.

Recently I was involved in a mixture and substance case where the bench notes suggested a very low quantity of meth was present. The attorney talked to the chemist who spoke Greek whereupon I was given permission to talk to the chemist directly. She confirmed my suspicion the quantity of meth was very low. When asked about conducting the quantitation, I was told their lab's policy was not to quantitate anything less than 2% and this sample was less than that cut off level. In this instance, the defense was able to provide the court with a "maximum" meth level that directly impacted the level at which the defendant was sentenced.

Keep in mind that this type of examination is not as precise as actual quantitation, however, it does provide the attorney with information that can be used to assess the need for their own testing.

Part 11 – Defense Testing

Defense testing of samples, in my experience, is not always cut and dry. In all jurisdictions, retesting requires obtaining a court order. Most times the AUSA likes to require the samples not be released to the defense, rather be produced at the defense lab at a particular date and time. Still others require information about the chemist to be used and will demand this chemist have a DEA license. In those instances of mixture and substance I have been asked to review, the motion for the court order has been opposed by the AUSA under the guise the meth content is irrelevant as the defendant is not charged with having any amount of pure meth.

As an expert, It has long been my position that retesting should be a last resort. Not only is it expensive, but most often the government will have someone there to observe, thus providing them with potential analytical information the defense may or may not wish to use. This person can be a DEA or case agent, but it has also been a member of the original lab. Your testing could end up providing the government with evidence that had not derived.

Even though you may choose not to endorse your chemist, that does not necessarily mean the government may not. I have worked cases where I was not supposed to testify, but did receive telephone calls from the government asking questions about my work.

If you decide to have the samples retested, I would encourage you to find someone who has experience in dealing with clandestine samples. They should be aware of the need to document not only their work, but the reliability of the equipment they are using. I would strongly suggest their examination include the tests to identify the substance as meth as well as the amounts present.

In addition to the examinations, your expert should have the skills and ability to present their information in court in a manner that could be understood. This presentation should be one where your expert can specifically delineate his or her opinion in a way that promotes objectivity in their opinion and not one of mathematical wizardry.

Finally, find an expert you can talk, who is willing to spend whatever time necessary to bring you up to speed on what you need to know about the evidence.

Part 12 – The Role of Scientific Literature in Theoretical Yields

In many theoretical yield debates, experts for the government and the defense will use scientific literature to support their premise. Even today, DEA experts will testify to the use of a 100% yield in their calculations, meaning using the conversion factor, each gram of ephedrine will result in 0.92 grams of Methamphetamine.

When arriving at a theoretical yield estimate often the experts will cite scientific studies or journal articles that are considered "authoritative" and generally accepted in the forensic sciences. Two of these articles are listed below.

Skinner, Harry F. "Methamphetamine Synthesis Via Hydriodic Acid/Red Phosphorus Reduction of Ephedrine" *Forensic Sciences International*, Vol 48, pgs 123-134 (1990). This article cited a clandestine theoretical yield range of 50 - 75% by weight.

Breemer, Nila and Woolery, Robin, "The Yield of Methamphetamine, Unreacted Precursor and Birch By-Product With the Lithium-Ammonia Reduction Method As Employed in Clandestine Laboratories" *Midwest Association of Identification Newsletter*, (1999) This Iowa Study article was more comprehensive in nature than most previous studies. It concluded, "In the average situation where the exact procedure followed at a site is not known, a range of 40 - 50% yield of Methamphetamine hydrochloride is a reasonable estimation."

A word of caution regarding most scientific articles on this subject is the overall premise of the study. Some articles recite results that are derived from less than the scientific method.

The attorney should be aware there are many different forms of scientific journals beyond those commonly used in the forensic sciences. There are journals in analytical chemistry, organic chemistry and other related fields that do offer some assistance. For example, the Ammonia cook method first appeared in a Journal back in 1971. This article described the "Birch Reaction" and it was ingenious clandestine cooks who brought it into the drug world.

The use of "learned treatise" in the federal courts is a long accepted practice. It provides the basis for expert testimony and opinion. In the area of clandestine labs, however, it appears the amounts of scientific literature specifically pertaining to clandestine labs is lacking. Among the reasons could be:

1. Most clandestine labs employ less than desirable equipment. It is difficult to examine and study the wide variety of equipment types and chemical sources used in the manufacture of Meth and draw logical conclusions.
2. Any such study in the area of clandestine labs must be approved by the DEA. When a researcher, academic or private, is attempting to synthesis Meth to study the various factors, they are violating state and federal law. Think about this if you are offering an expert who is willing to testify to his or her experience in the synthesis of Meth.
3. No two labs are alike.

There is also a reliance on only that literature that supports an expert's opinion. Contrary opinions are seldom viewed in most favorable light. Take for example, the Eschman case. The defense produced an expert witness who indicated the lab was "primitive", cited the Iowa study and opined based upon what was found "he could not determine a possible yield." This followed the testimony of the DEA expert who cited the use of the 100% yield, admitted it is virtually impossible to obtain 100% results and did not dispute the Iowa Study. The courts found in favor of the Government's estimation.

This should not come as a surprise when one considers statements made in *U.S. v. Coleman*, 1998 U.S. App Lexis 38767 "Defendant's who challenge the sentencing courts determination of

drug quantity face an uphill battle on appeal because we will reverse a determination of drug quantity only if the entire record definitively and firmly convinces us that a mistake has been made."

The future of theoretical yields and literature may be headed to Daubert questions.

Part 13 - Pre-Sentence Investigation Reports

This document is heavily relied upon during sentencing proceedings. Prepared by Probation and Parole, this often documents and includes information regarding theoretical yields. There have been cases where Probation and Parole completed an estimated yield without intervention or assistance of experts.

This document contains the information relating to the calculations used in establishing the lab capacity. It is often necessary to compare the information contained in this document against the investigative reports and evidence listings. On a couple of occasions information was contained in the pre-sentence investigation report that was not found in any other document.

This report should be provided to your expert. He or she should study the information and calculations carefully. Reports of Examination can and should include any statement or cite your expert calls into question.

Part 14 - Photographs

There are very few instances where your expert will be able to examine or tour a clandestine site that is in the same or similar condition as it was at the time of the investigation. This increases the reliance on photographs and/or video tapes taken by law enforcement. The expert can use these photographs as a means of determining the complexity of the lab as well as other clues to its potential yield.

If the photographs are in color, submit them as color photos to your expert. Xerox copies or fax copies do not afford the detail necessary for proper examination. It is not uncommon for some experts to import photographs in the body of their report, especially when it can be used to demonstrate a point or bolster an opinion.

Summary

The issue of determining theoretical yields remains a hotbed of debate within the legal community. In *U.S. v. England*, 966 F.2d 403, Senior Circuit Judge Bright wrote a separate comment regarding sentencing guidelines. In that comment he said:

"I write separately to comment about the draconian sentences here imposed, and to observe that although not illegal, these sentences emanate from a scheme gone awry."

"..Under the sentencing guidelines scheme now in vogue, a judge can exercise little, if any, judgment on these matters. The probation officer computes the sentence; the judge generally only ratifies it."

"...Indeed, the Commission's preoccupation with weights and measures as the basis for punishment in a case of this kind seems to run counter to the Congressional directive that the court shall impose a sentence that is sufficient, but 'not greater than necessary to comply' with the sentencing objectives established by Congress."

In *U.S. v. Eschman*, Circuit Judge Easterbrook comments on theoretical yields:

> "The prosecutor contended, and the district judge concluded, that seizures of methamphetamine did not 'reflect the scale of the offense,' so the parties set out to determine 'the size or capability of any laboratory involved.' But instead of inquiring whether the laboratory was large, sophisticated, efficient, and so on—keys to its ability to turn out methamphetamine, and therefore good clues to how much of that drug this operation *had* produced (and thus to the scale of the offense)—both litigants and judge asked instead how much methamphetamine could have been made using the stock of raw materials on hand when the police arrived."
>
> "The district court concluded that the pseudoephedrine could have been used to make an equal weight of methamphetamine, but this finding is clearly erroneous, for it conflicts with expert testimony offered by both sides. Under Application Note 12, the finding is also irrelevant because it does not demonstrate 'the size or capability of any laboratory involved.'"

Judge Easterbrook's comments in one of the most recent decisions sheds light on how complicated theoretical yield issues are to become. Instead of moving towards a method that is less subjective, it appears the court is entertaining a concept of the increased use of non expert testimonial evidence in determining lab capacity. It places the expert in a position of not only having to opine on the precursor and chemicals present, but also on his or her perception of the sophistication of the operation.

This type of approach also affects the Government's experts. Many theoretical yield reports prepared by government experts are based upon their analysis of various samples submitted to them. These experts may have little knowledge of the scene or the investigation itself and only in rare instances are they provided photographs or evidence listings. As the defense attorney, you should be prepared to inquire and highlight any potential lack of case pertinent knowledge as it relates to the determination of theoretical yields.

Theoretical yield determinations have gone beyond the scope of mere calculations. As these examinations expand into more "gray" areas, the need of expert assistance in the preparation of your case can only increase.

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Clandestine Meth Labs

Paradigms, Preparation and other Phun Information

There is more to being an expert than mere testimony. Experts can be a behind the scenes consultants guiding the attorney through the maze that can be evidential issues. Expert can, and should be, "educators" attempting to share their knowledge and experiences with others. Instead of picking one topic for this handout, I opted to include some of the experiences gained over the course of my involvement in clandestine meth lab cases across this country.

One might be lead to believe over time clandestine meth lab cases would run the same course as others - become more routine and static in nature. While that may be your experience, it certainly hasn't been mine. In this document we will explore some of the trends being found in these cases and in the court proceeding from various districts across the country. Some of these may be "Coming Soon" to your district.

Paradigm #1 came when the Sentencing Guidelines became "advisory" in nature it was believed giving the judges discretion would be a move in promoting fairer sentencing. Many attorneys began arguing the progress of the defendant in accepting his responsibility and in drug rehab programs. Lab related issues and theoretical yield submission were not specifically addressed and those case submissions declined.

The reality has not kept pace with the hype. It is my understanding from talking to several attorneys the same judges who would privately and in some instances publicly disagreed with "mandatory sentencing" have not deviated from the Guidelines on many cases. This is totally in line with the old saying "Be careful what you wish for, it might come true."

Most of the clandestine lab cases in the Federal System result in guilty pleas. That makes the Sentencing Hearing the real trial in the case. We should not overlook understanding the nature of the lab and its evidences can have a direct impact on the sentencing hearing. Understanding the lab is key to gaining some insight into potential yields as well as roles in the case.

Understanding the Lab

Paradigm #2 all meth labs are the same. With over 400 reviews of these cases I can tell you, without hesitation this is not true. While many may utilize the anhydrous cook or Red P method, the similarities stop there. The nature of the lab, the equipment, the supplies and the cook themselves all have a bearing on these labs as well as their production capabilities.

Another reason not all labs are alike is the methodology. Here some examples of the variations that are found:

1. The lithium is added to the anhydrous. The next step involves the addition of the precursor. Some labs "ice" the reaction vessel in an attempt to keep the anhydrous from evaporating and increasing the yield, while others involve going to the farmer's field adding the anhydrous from the tank to a jar that already contains the lithium and

precursor and letting the reaction occur until all anhydrous is gone taking the finished product to another location for "gassing."

2. Some labs involve using a "splash" of anhydrous. By this the precursor and lithium are placed in a jar and a small amount of anhydrous is added and the jar swirled. This promotes even lower yields. Analysis conducted on these types of cases often find un-dissolved lithium metal. There must be the right amount of anhydrous, lithium and precursor for the reaction to occur with some semblance of yield.

3. Some cooks extract or "rinse" the Pseudoephedrine before it is added to the reaction mixture while others do not. Those that do not significantly decrease the yield due to the presence of the "inert ingredients" found in the OTC meds.

The photographs of these scenes provide further proof that all labs are not alike and they play a vital roll in the review process. I highly recommend you should always obtain color copies of the pics and if they are on disc, a copy of the disc is easier to handle and ensures you have all the photos.

The lab reports are often felt to be more important come theoretical yield time, but they also are a facet of the review and understanding the lab. For example, an analytical report on three samples from a lab sight all found the presence of methamphetamine and PSE. One of the samples was also found to contain Triprolidine, an anti-histamine. That finding was sufficient to demonstrate a different form of precursor was used which contradicted the information provided in the police reports.

All of this type of information is a part of case preparation and once there is a "handle" on the nature of the lab, the process of deriving a theoretical yield or production amount can commence.

Theoretical Yields

A theoretical yield basically is "the amount a meth cook cooks if a meth cook could cook meth."

The best basis for theoretical yields comes from the amounts of precursor found. Evidence of precursor can be determined from the number of pills, boxes, blister packs and receipts for OTC meds. Additional information about the amounts can be found in the trash or burn barrel/piles if they are present and checked.

That brings us to **Paradigm #3,** a 50% yield is standard in clandestine meth lab cases. This proposition is being propagated in several Federal jurisdictions and is inaccurate for the following reasons:

1. To derive a 50% yield, you take the amount of precursor and divide it in half. A simple process that assumes a 1:1 conversion rate of PSE to meth. The Eschmann case (227 F.3d 886,7th Circuit, 2000) rule a 1:1 conversion is inappropriate. The conversion factor is based upon the molecular weights of meth and PSE and is found to be 1 to 0.92, meaning 1 gram of PSE will produce .92 grams of Meth.

2. Nila Bremer and Robin Woolery of the Iowa Department of Public Safety conducted a study *"The Yield of Methamphetamine, Unreacted Precursor and Birch By-Product With the Lithium Ammonia Reduction Method As Employed in Clandestine Laboratories"*

(Midwest Association of Identification Newsletter, 1999), known as "The Iowa Study" They concluded "in the average situation where the exact procedure followed at a site is not known, a range of 40 - 50% yield of Methamphetamine Hydrochloride is a reasonable estimation."

3. The Iowa Study also contained information that would allow yield opinions to be higher or lower than the above values and I have reviewed lab reports from their agency that indicated a 17 - 20% yield depending on the nature of the evidence and laboratory analysis.

A theoretical yield or production estimate is a mathematical calculation that requires accurate information for it to be valid. As you will see later in this document inaccurate, qualified or non-specific information cannot be used in this process.

I would strong urge you to be highly suspect if there is any yield estimate based upon such evidences as solvents, amounts of anhydrous ammonia, lithium, red phosphorus or Iodine. There is no standard recipe and variations from cook to cook make the use of these invalid.

I would also caution to be weary of any lab report finding an usually high percentage of meth. If you find anything above 70%, I would strongly urge you to obtain the "bench notes" and have someone versed in the field review the data for accuracy.

Multiple Defendant Labs

Probably the hardest cases are those involving multiple defendants. Whenever you encounter this type of case, wear glasses as the finger pointing could cause eye loss. A general comment about these cases in my experience has been the person with the least amount of evidence against them becomes the king pin.

These are the kinds of cases where understanding the scene and the evidence can be vital at sentencing. First question, is there any physical evidence found at the scene that links your client to the operation? This would include fingerprints for example which results in **Paradigm #4** - you can't get fingerprints off lab related items due to the chemical residues.

I don't have a count on the number of times certified clandestine lab investigators have testified to this "fact." If it is possible to fingerprint a gun that has somewhat of an oily surface, what is it about the chemical vapors that prevent fingerprint deposition and processing? The answer is nothing.

Okay, but don't most cooks wear gloves thus preventing the deposition of fingerprints? That answer is yes and no. Rubber gloves can be found at a scene, but one must always keep in mind most people involved in meth cooks are not "rocket scientists", some spell chemistry with a "K" and most do not wear any type of gas mask to avoid the noxious odors that can be produced. Besides before a cook is started most cooks do not wear gloves while handling OTC med boxes, blister packs, jars etc.

I would suggest you read the statements of the co-defendants carefully and determine if they are all consistent in describing your client's participation. I am reminded of a case where the other three co-defendant's statement had the defendant being the precursor supplier, the person who got the anhydrous and the person who did the gassing. Not bad for a person the police surveillance showed arrived about 10 minutes before the raid! This defendant's actual "role" in the lab was never shown.

Another case involved 2 individuals charged with a cook found in a wooded area. The conscientious investigator took photographs of all the shoeprints he found and upon examination there was only one out-sole design eliminating the two person concept.

Historical Evidence

I placed this topic after theoretical yields and co-defendant statements on purpose. Basically historical evidence is the deriving of a theoretical yield or production amount based upon the statements of others, whether they are co-defendants, others who claim to have knowledge about your client's cooking abilities or those who indicate they purchased meth from your client.

In a very recent Pennsylvania case, the government relied upon the statements of 12 individuals plus a "confidential informant" with knowledge about the client's cooking and selling of meth to derive the total amount of meth attributed to the defendant for the purposes of the PSR and sentencing. The judge allowed a detective to read the statements into the record. That raised a couple of interesting questions: 1) as a defense attorney how do you cross examine a report and 2) an interesting legal issue regarding the right of the defendant to confront his or her accuser. I'm not a legal scholar so I'll leave these two things for you to consider.

What became apparent during the review of these statements were three issues that came into focus while estimating yield and production, those being the use of "qualifiers," "non specific information" and "double counting."

Qualifiers

"Qualifiers" may not be the right word for this but I am referring to statements such as the examples listed below. I have underlined the questionable part:

1. Estimated the number of times meth was purchased was 10 - 15 times.
2. Indicated he purchased crank from Defendant #1 and Defendant #2 on a "few occasions."
3. Indicated she obtained meth approximately 50 - 60 times.
4. Indicated she purchased meth from the defendant on approximately 50 occasions with the most being ½ ounce.

These qualifiers make it almost impossible to derive a theoretical yield that would be "within a reasonable degree of scientific certainty." How do I know what a "few" means or what "approximately 50 - 60" indicates? How can you estimate an amount if the number of occasions is an approximate and only the highest amount were listed?

Non Specific Information

The "non specific information" examples are as follows:

1. Indicated she purchased 10,000 pills
2. Obtained boxes of cold and allergy medication from Dollar General.

3. Cooked with defendant 3 times using 1,000 pills yielding about an ounce.

As I indicated, precursor material is the best basis for formulating opinions as to theoretical yields and production amounts. To accomplish this, one must know the number of pills and the dosage of Pseudoephedrine. Using this information you can determine the total amount of precursor available for conversion.

As you can see in the examples not all the required information was present.

That brings us to **Paradigm #5** cooks in a particular region or area **always** use the same precursor material. In this instance the government was proposing that all the cooks used 30 milligram tablets. The basis for this was one statement where one individual referred to a "box of 96 pills" and another statement where another statement talked about "1,000 red pills." Both statements are consistent with 30 milligram Sudafed pills.

The statements themselves showed the paradigm to be incorrect. The same individual who talked about 1,000 red pills also indicated they did a cook with 60 milligram tablets. An analytical report revealed the presence of "triprolidine" in one of the samples which was not found in the other submissions.

"Double Counting"

The final issue with any case where a theoretical yield from manufacturing and amount of meth sold are combined is "double counting."

Both the Pennsylvania case and others have included statements that a particular subject provided pills or other supplies to the cook in exchange for some quantity of meth. Here's an example that might clarify what I am talking about.

A subject provided 1,000 sixty milligram pills to the cook and was to receive and "eight ball" of meth in return.

Estimated amount of meth produced	20.0 grams
Eight ball weight	3.5 grams
Total amount attributed to defendant	23.5 grams

Since the weight of the eight ball came from the cook, it should not have been added to the amount from the cook. This is double counting.

One cannot overlook the fact that "meth heads" who have been using since their teenage years may not have the best recall as it comes to "reliability." If you have ever talked to one of these people it becomes somewhat apparent there could be some "dain bramage." What was really interesting is all these statements were in the form of "proffers" and the investigators had the ability to clarify these qualifiers or non specific information if they so choose.

Theoretical Yields from Statements

I opted to throw this in the mix mainly for confusion factors. As you noted in one of the examples one of the statements indicated that a 1,000 pill cook resulted in about an ounce of meth. In the Pennsylvania case the government used 30 milligram pills and this as the basis for this calculation; each cook was worth 28 grams of meth.

To show how absurd this got, one statement indicated the defendant was seen with meth making supplies (no further information) about 100 times which resulted in an estimated yield attributed to him of 2,800 grams.

First we have already discussed the "about" concept, but 1,000 thirty milligrams of PSE has a total of 30 grams of precursor. Even though this is "mixture and substance" it still would make it a very high yield almost doubling a DEA agent's opinion of 15 grams of meth from the same amount and dosage of pills.

No where in the statement nor did any investigator asked the subject how he derived this yield. We know it was not weighed so if anyone in the audience can show me how to accurately estimate an ounce from powder, I'd be all up for it.

Preponderance of the Evidence

For most of my involvement with clandestine meth labs and theoretical yields I have always been asked if my opinion was within a reasonable degree of scientific certainty. In the past year or so, it appears the courts are adhering to the preponderance theory, a 51% chance something is correct - I think that's what this means - in other words "more likely than not."

Mathematical calculations are supposed to be precise. There are means to solve equations with variables, but they still are a number based upon a solid premise. For example 2 + 2 = 4 is factual so how does the preponderance concept come into play here? All of us have had a math course somewhere along the line where we might have received "partial credit" for demonstrating our work, but if the answer was wrong, it was still wrong. I guess if you got sufficient partial credit for your work that exceeded 51% of the total points for the question, you have a "preponderance."

Manufacturing and Distribution Charges

Since we were discussing a case involving both manufacturing and sales, I want to relate a case that was rather innocuous at first. The client was charged with manufacture and distribution of a controlled substance. The government "sting" netted a rather large number of people who were more than happy to spill their guts about anything and anyone in the hopes of cutting a deal. The defendant was one of the "unlucky" ones whose name seemed to come up quite frequently as a cook and one they purchased meth from.

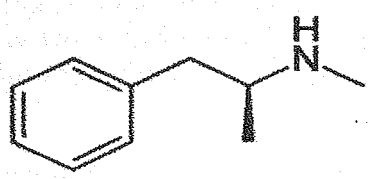
The investigators did take excellent statements obtaining dates and amounts from each of these individuals. Since we had concrete information of how often the defendant cooked, I opted to create a spread sheet to see if the sales exceeded the production capacity. What I found was even more interesting.

Included in the discovery was the defendant's rap sheet including dates of incarceration. While this makes for interesting reading, under normal circumstances I would shred this type of information as not applicable to my efforts. For some reason it avoided this ultimate fate.

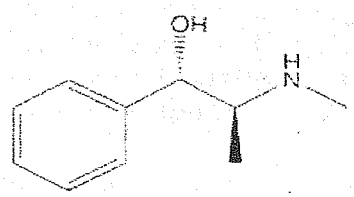
I found seven sales that were supposed to have occurred during the time the defendant was in jail. A little leg work by the attorney to prove these incarceration times went a long way to strongly questioning the reliability of a few witnesses, lowering the total amount sufficient to bring it to a lower sentencing guideline level.

Phenylephrine – A replacement for Pseudoephedrine?

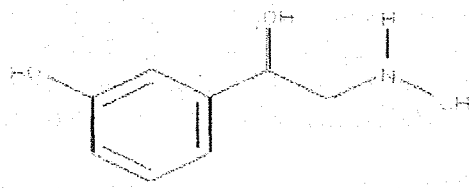
Over the past six months I have received a couple of cases involving Phenylephrine as the precursor in meth cooks. Below are the chemical structures for these substances.



Methamphetamine



Pseudoephedrine



Phenylephrine

Phenylephrine is a decongestant that is finding its way into many OTC cold medications replacing pseudoephedrine as the active ingredient. As the ability to obtain PSE is becoming more difficult, it appears that some cooks are attempting to replace it with the Phenylephrine, as a matter of fact one of the defendant's thought they were the same thing because they sounded alike!

Phenylephrine cannot be converted to methamphetamine via the Anhydrous Cook or Red P method. To get there is much more complex than what can be reasonably achieved in the kinds of labs frequently encountered.

This reminded me of an old case where a cook decided that getting anhydrous ammonia was too risky, he opted to use "ammonia" cleaning solution believing they were one and the same with the exception ammonia cleaning solution was a more dilute form. No matter how hard he tried, he never got meth.

This will make for some interesting legal battles in the future if this trend continues. I can envision the prosecutors arguing that whether it can be converted or not the defendant made a "substantial step" with the "intent" to manufacture methamphetamine.

Restitution

I hope you are sitting down for this one. A federal meth lab case was submitted in which $13,000 dollar amount for restitution for clean up costs was included in the PSR. The lab site was a motel and the owner was claiming not only the hazmat costs, but the cost of removing and replacing walls, ceiling, carpeting, fixtures and the loss of income – a total of six months due to the remodeling of the room.

The photographs clearly demonstrated evidence of at least some part of the process was present. There was no evidence of precursor or essential chemicals found in the room. There was tubing and a plastic bottle consistent with a gassing chamber present in addition to plastic bags, small balances etc.

I was asked to review the case on the basis of "endangering human life" concepts. The photographs also failed to reveal any indication of "overt" damage caused by any cook or process of the cook; there were no burn holes in the carpeting, staining or damage to the furniture or walls. All the jars found in the room appeared to be capped and sealed and none of the officers who were present reported any "chemical odor" present during the investigation.

There was no air monitoring conducted inside the room before the remodeling was started, therefore there was no evidence to dictate any "actual" or "potential" danger actually existed.

Summary

Clandestine meth lab cases are not static, they are individualistic and occasionally full of surprises, both good and bad. There exists a "bias" in the investigation where exculpatory or conflicting information is either ignored or not recognized. I don't know how many cases I have received where the lab was referred as being "active" yet the supplies and equipment was found packed in boxes or strewn throughout the site. In most cases the only way to actually understand what you are dealing with is through a review process.

The government can also increase the fun through sentencing via "actual" meth or "mixture and substance" amounts. Prior to sentencing I would urge all attorneys to have the information checked to ensure the accuracy of the figures and I have found about four cases where the use of "actual" meth resulted in lower sentencing levels.

Not all case reviews are going to be favorable and a good expert will not only let you know of this fact but the reasons why. In some instances it takes the efforts of the expert to move your client off head strong opinions and demands.

Clandestine meth labs are challenging cases that involve a wide range of issues to be considered and if this document provided any assistance in your pursuits, then it has served its purpose.

BOP POLICIES AND PROCEDURES

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I. Bureau of Prisons' Policy on Community Correction Placement

II. Two component phases
   A. Pre-release component
   B. Community Correction component

III. Furlough

IV. Residential Drug Abuse Program

V. "Road To Success" brief DVD provided by the Inmate Transition Branch

Residential Re-entry Center
Furlough
Comm. Corr.

Center of Excellence - Grand Prairie, Texas
Contract ½ way houses
Continuing Discipline
RDAP -

P.S. 5270.07
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Inmate Discipline Outline

I. Bureau of Prisons' Policy on Inmate Discipline

II.. Four phases of Incident Reports
- A. Observe
- B. Write
- C. Investigate
- D. Refer if appropriate

III. Incident Reports
- A. Overview and Codes
- B. Sections
- C. Investigation
- D. Unit Disciplinary Committee
- E. Disciplinary Hearing Officer (DHO)
  1. Rights at hearing with DHO include Staff Representative and Witnesses
  2. Loss of Good Conduct Time

IV. General Information Concerning Incident Reports
- A. Can be charged with more than one code on the report if appropriate.
- B. Accurate information needs to be provided otherwise report could be re-written
- C. Timelines

V. Residential Re-Entry Center Incident Reports
- A. Absentia Reports
- B. DHO Certification

THE CLAIBORNE CASE

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THE CONTINUING STRUGGLE FOR JUST, EFFECTIVE AND CONSTITUTIONAL SENTENCING AFTER *UNITED STATES v. BOOKER*

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In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that judicial determinations of fact not found by a jury or admitted by the defendant to increase sentences under the Federal Sentencing Guidelines violated the Sixth Amendment. As a remedy, the Court excised 18 U.S.C. § 3553(b), which created a presumption in favor of the guideline range ("the court shall . . . unless the court finds . . ."), and excised 18 U.S.C. § 3742(e), which was designed to enforce the guidelines (by requiring *de novo* review of the factual basis, legal basis and extent of any departure, while reviewing within guideline sentences for correctness). The Court made § 3553(a) the governing sentencing law, thus rendering the guidelines "advisory," and prescribed a unitary standard of review -- "unreasonableness" with regard to § 3553(a) -- for *all* sentences within or outside the guideline range.

Eighteen months later, seven courts of appeals say the guidelines are presumptively reasonable on appeal.[1] While purporting to apply an abuse of discretion standard to below-guideline sentences, this review is virtually equivalent to *de novo*.[2] District court judges within these circuits, and even some in circuits that have rejected

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[1] *United States v. Dorcely*, __F.3d__, 2006 WL 2034245 (D.C. Cir. 2006); *United States v. Cage*, 451 F.3d 585 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Mykitiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005). While the Eight Circuit has adopted a presumption of reasonableness, *see, e.g., United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005), it has also rejected the position that "the range of reasonableness is essentially co-extensive with the Guideline range" because that "would effectively render the Guidelines mandatory. . . . The Guidelines range is merely one factor." *United States v. Winters*, 416 F.3d 856, 861 (8th Cir. 2005). A panel of the Sixth Circuit adopted the presumption without explanation, *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006), but then made clear that it does not apply unless the district court actually recognized its discretion to impose a non-guideline sentence, considered the § 3553(a) purposes and factors, exercised its independent judgment as to what sentence is sufficient but not greater than necessary to satisfy the purposes of sentencing, and gave a reasoned explanation for the sentence. *United States v. Foreman*, 436 F.3d 638 (6th Cir. 2006); *United States v. Buchanan*, 449 F.3d 731, 738-41 (6th Cir. 2006) (Sutton, J., concurring).

[2] *E.g., United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006); *United States v. Saenz*, 428 F.3d 1159 (8th Cir. 2006).

this view, apply a presumption at sentencing, while finding the facts by a mere preponderance of the "probably accurate" hearsay. In short, federal defendants continue to be sentenced in violation of their constitutional rights.

How did this occur? Some say it was the inevitable and even intended effect of Justice Breyer's remedy.[3] If so, other institutional actors have added potent fuel to the fire. The Department of Justice (DOJ) has periodically let it be known that a legislative "fix" was in the works. Its "fix" has not yet been introduced in the House, has garnered no visible support in the Senate, and would not likely survive a constitutional challenge even if enacted.[4] Nonetheless, the threat of a "fix" has undoubtedly had its intended effect.[5] On the litigation front, DOJ has openly defied the Supreme Court, issuing a directive to all line prosecutors to "actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases" and to report "sentences outside the appropriate Sentencing Guideline range."[6] As an early commentator predicted, this directive may "strike fear into the hearts of judges who may have the

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[3] *Booker*, 543 U.S. at 311-13 (Scalia, J., dissenting in part), *id.* at 288 (Stevens, J., dissenting in part); *United States v. Kandirakis*, __ F.Supp.2d __, 2006 WL 2147610 (D. Mass. Aug. 1, 2006).

[4] *See* Constitution Project's Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 8-9 (July 11, 2006); Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule Harris*, 18 Fed. Sent. Rep. 4 (April 2006).

[5] *See United States v. Wilson*, 355 F. Supp.2d 1269, 1287-88 (D. Utah 2005) ("Should the courts fail to carry out congressional will, there should be little doubt what will follow. Congress can easily implement its desired level of punitiveness in the criminal justice system, through such blunderbuss devices as mandatory minimum sentences. It is far better, then, for courts to exercise their discretion to insure that Congress' intention is implemented today through close adherence to the congressionally-approved Guidelines system, with only rare exceptions for unusual situations."); *United States v. Jimenez-Beltre*, 440 F.3d 514, 521-24 (1st Cir. 2006) (Howard, J., concurring) (writing separately to "emphasize that sentencing courts are still to accord the guidelines substantial weight and that sentences outside the guidelines sentencing range are reasonable only so long as and only to the extent that they can be said to comport with the Sentencing Reform Act of 1984 . . . . I cannot say that these positions are required by the language of *Booker* [but they are] likely to yield a federal sentencing regime that accords with Congress's policy preferences. . . . [I]f post- *Booker* sentencing practices come to be perceived as resembling too much the non-uniform sentencing that gave rise to the guidelines, Congress may well respond with legislation that circumscribes judicial power and discretion even more tightly.").

[6] Memorandum to All Federal Prosecutors from James B. Comey, Deputy Attorney General, January 28, 2005, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf.

'temerity' to exercise discretion beyond that found in the Guidelines, which brings into question just how 'advisory' the Guidelines will be."[7]

The premise of the reincarnation of presumptive guidelines is the fiction that the guidelines incorporate the sentencing purposes and factors that 18 U.S.C. § 3553(a) directs judges to consider. This first appeared in a district court decision issued the day after *Booker* was decided,[8] next appeared in the Sentencing Commission's testimony before Congress,[9] was then disseminated by the Commission to judges, probation officers and prosecutors across the country in training presentations and written materials,[10] and was soon repeated verbatim in judicial opinions.[11] Courts of appeals that had originally adopted a presumption of reasonableness without giving a reason,[12] later justified the

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[7] Zachary R. Gates, *Obeying the "Speed" Limit: Framing the Appropriate Role of EPA Criminal Enforcement Actions Against Clandestine Drug Laboratory Operators*, 13 Penn St. Envtl. L. Rev. 173, 208 n.197 (Summer 2005).

[8] *United States v. Wilson*, 350 F.Supp.2d 910 (D. Utah 2005).

[9] *See* Prepared Testimony of Judge Ricardo H. Hinojosa Before the Subcommittee on Crime, Terrorism and Homeland Security (Feb. 10, 2005) ("During the process of developing the initial set of guidelines and in refining them throughout the ensuing years, the Sentencing Commission has considered the factors listed at section 3553(a) and cited with approval in Booker. . . . In short, the factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision.") (hereinafter "2/10/05 Commission Testimony"), http://www.ussc.gov/Blakely/bookertestimony.pdf. *See also* Prepared Testimony of Judge Ricardo H. Hinojosa before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United States House of Representatives at (March 16, 2006) ("The guidelines embody all of the applicable sentencing factors for a given offense and offender.") (hereinafter "3/16/06 Commission Testimony"), http://judiciary.house.gov/media/pdfs/hinojosa031606.pdf.

[10] U.S. Sentencing Commission, *Post-Booker Guidelines Training 2006*, Tab 1 ("guidelines consider" each listed purpose and factor), Tab 7 (containing 2/10/05 Commission Testimony), on file with the author; U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (March 2006) ("training program explains how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight in fashioning sentences post-*Booker*") (hereinafter "Booker Report"), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

[11] *See United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005); *United States v. Peach*, 356 F.Supp.2d 1018, 1021 (D.N.D. 2005).

[12] *See United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005).

presumption with the assertion that the guidelines already incorporate the sentencing purposes and factors set forth in 18 U.S.C. § 3553(a).[13]

There are three serious problems with this rationale. First, it is not accurate according to the Commission's own reports, the guidelines manual, and reliable historical sources including Justice Breyer. Second, the only difference between the system it creates and the system just struck down (in which departures were allowed based on factors not taken into account by the Commission) is that there can be no rationale for *ever* varying from the guideline range, making the guidelines even more mandatory than they were before *Booker*.[14] Third, judicial factfinding by a preponderance of the evidence in this system is therefore unconstitutional.

Five courts of appeals (with varying degrees of commitment) and many district court judges have declined to accept the premise that the guidelines incorporate the statutory purposes and factors or the conclusion that they are to be presumptively followed.[15] Though I count the First Circuit in this group, that court is unique in having held, inconsistently, that the guidelines are not due a presumption on appeal but that the district court may accord them substantial weight at sentencing. In joining the former holding and dissenting from the latter, Judge Lipez wrote:

> There is scant difference between treating a guidelines sentence as presumptively controlling and stating that the court will depart from that sentence only for "clearly identified and persuasive reasons." . . .
>
> There are some who contend that the advisory guidelines largely account for all of the relevant sentencing factors. *See, e.g., Shelton*, 400 F.3d at 1332 n.9 ("The factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under Booker and § 3553(a)."); *see also* Prepared Testimony of Judge Ricardo H. Hinojosa, Chair, United States Sentencing Commission Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, United

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[13] *See United States v. Terrell*, 445 F.3d 1261 (10th Cir. 2006); *United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006).

[14] *See* Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 Ariz. St. L.J. 425, 453-54 (2006).

[15] *United States v. Hunt*, __F.3d__, 2006 WL 2285715 (11th Cir. Aug. 10, 2006); *United States v. Carty*, 453 F.3d 1214 (9th Cir. 2006); *United States v. Grier*, 449 F.3d 558 (3d Cir. 2006); *United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006); *United States v. Cooper*, 437 F.3d 324, 331-32 (3d Cir. 2006). For illustrative district court decisions, *see United States v. Jaber*, 362 F.Supp.2d 365, 370-76 (D. Mass. 2005); *United States v. Huerta-Rodriguez*, 355 F.Supp.2d 1019, 1025 (D. Neb. 2005); *United States v. Myers*, 353 F.Supp.2d 1026 (S.D. Iowa 2005); *United States v. Ranum*, 353 F.Supp.2d 984 (E.D. Wis. 2005).

States House of Representatives (Feb. 10, 2005), available at http://www.ussc.gov/Blakely/bookertestimony.pdf (last visited Feb. 25, 2006) (same). That being so, the argument goes, there must still be primary reliance on the guidelines in sentencing.

This argument is too facile. As the majority points out, the guidelines are inescapably generalizations. They say little about "the history and characteristics of the defendant." Indeed, the guidelines prohibit consideration of certain individualized factors . . . . The guidelines also discourage--except in "exceptional cases"-- consideration of other individualized factors . . . .

The guidelines are no longer self-justifying. They are not the safe harbor they once were. However, if district courts assume that the guidelines sentence complies with the sentencing statute, and focus only on the compliance of the non-guidelines sentence urged by the defendant, the district courts will effectively give the guidelines a controlling weight and a presumptive validity that is difficult to defend under the constitutional ruling in *Booker*. . . .

[G]iven the close divisions on the Court about the post-*Booker* role of the guidelines, and given the new composition of the Court, it would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post-*Booker* that approximates, in a new guise, the mandatory guidelines.[16]

Indeed, Justice Scalia and Justice Stevens predicted that the remedial opinion may invite the *de facto* mandatory guidelines that the merits opinion forbade.[17] One would hope that the justices who voted for the remedy (Breyer, Kennedy and Ginsburg, JJ., remaining) did not intend that result. Justice Ginsburg, at least, may be quite dismayed. She recently indicated how she would rule on presumptive guidelines in a new guise: "In sum, Recuenco, charged with one crime (assault with a deadly weapon), was convicted of another (assault with a firearm), *sans* charge, jury instruction, or jury verdict. That disposition, I would hold, is incompatible with the Fifth and Sixth Amendments."[18]

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[16] *Jimenez-Beltre*, 440 F.3d at 524, 526-27, 528 & n.11 (Lipez, J., dissenting). *See also United States v. Navedo-Concepcion*, 450 F.3d 54, 60 (1st Cir. 2006) (Torruella, J., dissenting) ("I am concerned that we are . . . regressing to the same sentencing posture we assumed before the Supreme Court decided *Booker* . . . . [I do not] believe that this is what the Supreme Court had in mind when it struck down the mandatory Guidelines regime.").

[17] *Booker*, 543 U.S. at 311-13 (Scalia, J., dissenting in part), *id.* at 288 (Stevens, J., dissenting in part).

[18] *Washington v. Recuenco*, 126 S. Ct. 2546, 2557 (2006) (Ginsburg, J., dissenting).

The Court has granted certiorari in *Cunningham v. California*, No. 05-6551, 2006 WL 386377 (*cert. granted*, Feb. 21, 2006), to decide whether California's presumptive sentencing system is constitutional. Under California law as written, the punishment for Cunningham's offense of conviction was 6, 12 or 16 years' imprisonment, with the middle term required absent facts in aggravation or mitigation. The court found aggravating facts by a preponderance of the evidence and sentenced Cunningham to the upper term of 16 years. While this appears to be a flat violation of *Blakely v. Washington*, 542 U.S. 296 (2004), the California Court of Appeal affirmed, relying on *People v. Black*, 35 Cal. 4th 1238 (Cal. 2005). In *Black*, the California Supreme Court held that the California system did not violate *Blakely* because, it said, California's sentencing law gave sentencing courts "discretion" to sentence to the lower, middle or upper term, with the middle term being "presumptive" and the upper term being the "statutory maximum" for Sixth Amendment purposes. *Id.* at 1257-58. In its Brief in Opposition, the State of California argued that the California system is indistinguishable from the federal sentencing system left in place by *Booker*, in that the presumptive middle term is functionally equivalent to the "reasonableness constraint" placed on federal courts by *Booker*.[19] The Court has also ordered the Solicitor General to respond to several petitions challenging the return to presumptive guidelines in the federal system.

Defense counsel must help to ensure that judges retain *and* exercise their sentencing power by providing arguments to support reasoned decisions that will be upheld on appeal (or not appealed at all), that Congress can respect, and that the public can understand. There are powerful arguments to be preserved below and raised in petitions for certiorari that post-*Booker* sentencing violates the sentencing law under basic principles of statutory construction, the Sixth Amendment right to jury trial, the Fifth Amendment right to proof beyond a reasonable doubt, and the Sixth Amendment right to confront and cross-examine adverse witnesses. But, as we have seen, legal arguments are not enough.

Even in circuits that have rejected presumptive guidelines, the guidelines provide a comfortable numerical anchor, and many judges have little knowledge of the guidelines' history and development other than what they are being told by advocates of the status quo. Further, just as in the lower courts, the outcome in the Supreme Court will depend on whether a majority believes that the guidelines are a reflection of § 3553(a) created by an independent expert body that followed its enabling legislation, as the Solicitor General contends in opposing petitions for certiorari. Thus, regardless of what circuit you are in or what stage of the litigation, it is necessary to demonstrate as a factual matter that the guidelines do not comply with 18 U.S.C. § 3553(a), and that a lower sentence does a far superior job. (At the same time, it is still critically important to litigate all legal and factual issues arising under the guidelines.)

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[19] Brief in Opposition of the State of California at 8-9, 10, 2005 WL 3783460 (filed Dec. 12, 2005).

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I. The Guidelines Do Not Incorporate the Purposes and Factors Set Forth in § 3553(a) or Other Statutory Directives to Ensure Fair, Efficient and Effective Sentences.

In the Sentencing Reform Act of 1984 (SRA), Congress directed the Sentencing Commission to assure that the purposes of sentencing set forth in § 3553(a)(2) (just punishment, deterrence, incapacitation as needed to protect the public, and needed education or treatment in the most effective manner) were met, to ensure that the guidelines were effective in meeting those purposes, to reflect advancement in knowledge of human behavior, to minimize the likelihood of prison overcrowding, and to avoid unwarranted disparities while ensuring sufficient flexibility to permit individualized sentences.[20] After *Booker*, under § 3553(a), judges must impose sentences sufficient but not greater than necessary to achieve the statutory purposes of sentencing, after considering the circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted disparities, and the need to provide restitution. Had the guidelines been developed according to congressional directives to the Commission, there might have been substantial overlap between the guidelines and § 3553(a) in many cases, though the guidelines would still be inescapably general. Given the way in which the guidelines were actually developed, it should be a rare case in which a sentence within the guideline range, much less above it, meets § 3553(a)'s requirements.

A. Abandonment of Sentencing Purposes and Past Practice in Favor of "Trade-Offs Among Commissioners with Different Viewpoints"

The Commission now claims that it "considered the factors listed in section 3553(a) and cited with approval in *Booker* . . . in developing the initial set of guidelines and refining them throughout the ensuing years."[21] Historical sources tell a different story.

Congress expected the Commission to consider all four statutory purposes in developing the guidelines, and that judges would decide what impact, if any, each purpose should have on the sentence in each case.[22] The original Commissioners, however, "considered" only "just deserts" and "crime control," then expressly abandoned those two purposes when they could not agree on which should predominate.[23] They solved their "philosophical dilemma" by adopting an "empirical approach that uses data estimating the existing sentencing system as a starting point,"[24] but did not follow that

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[20] 28 U.S.C. §§ 991(b), 994(g).

[21] 2/10/05 Commission Testimony, *supra* note 9.

[22] *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 59, 77 (1984).

[23] U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988).

[24] *Id.*

approach either. They implemented sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," including fraud, drug trafficking (above even what the mandatory minimum laws required), immigration offenses, robbery of an individual, murder, aggravated assault, and rape.[25]

These deviations from past practice resulted from "'trade-offs' among Commissioners with different viewpoints," said then Judge and Commissioner Breyer.[26] In response to complaints that the original guidelines were "too harsh," he said that "once the Commission decided to abandon the touchstone of prior past practice, the range of punishment choices was broad" and the "resulting compromises do not seem too terribly severe." In any event, the system was "evolutionary" and would be improved based on information from actual practice under the guidelines.[27]

B. Rejection of Relevant Mitigating Factors/Overstatement of Aggravating Factors of Questionable Relevance

The Commission now claims that the "guidelines embody all of the applicable sentencing factors for a given offense and offender."[28] However, as the Commission has said repeatedly, it is not possible to write a single set of guidelines that take into account all factors that are potentially relevant to sentencing decisions.[29] Further, the Commission has affirmatively rejected most relevant mitigating factors, while including a seemingly endless number of aggravating factors, many of questionable relevance, and giving them too great an impact.

The only offender characteristic included in the calculation of the guideline range is the aggravating one of criminal history. Yet, the principal source of legislative history for the SRA suggests numerous situations in which offender characteristics should be relevant, and emphasizes that "the Committee decided to describe [some of] these factors

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

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

[27] *Id.* at 18-20, 23.

[28] 3/16/06 Commission Testimony, *supra* note 9, at 18.

[29] *See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b); U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (October 2003) (hereinafter "2003 Downward Departure Report"), http://www.ussc.gov/departrpt03/departrpt03.pdf.

as 'generally inappropriate,' rather than always inappropriate, . . . in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration."[30] As then Judge and Commissioner Breyer explained, some Commissioners argued that mitigating factors such as age, employment history, and family ties should be included. They were not because, once again, the Commissioners could not agree. Again, this was intended to evolve based on experience.[31] No other offender characteristics have been added, though the Commission's research demonstrates that age, current or previous marriage, employment history, educational level, abstinence from drug use, first offender status, and being a drug or fraud offender all predict a reduced risk of recidivism.[32] Instead, the Commission has prohibited, discouraged or restricted most offender characteristics even as grounds for downward departure, contrary to past practice,[33] beyond what Congress directed,[34] and beyond what the original Commission intended.[35] Not surprisingly, most

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[30] S. Rep. No. 98-225, 98th Cong., 1st Sess. 172-175 (1984).

[31] Breyer, *supra* note 26 at 19-20; Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. R. 180, 1999 WL 730985 *5 (Jan./Feb. 1999).

[32] *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004) (hereinafter "Measuring Recidivism"), http://www.ussc.gov/publicat/Recidivism_General.pdf; *Recidivism and the First Offender* (May 2004) (hereinafter "First Offender"), http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf; *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) (hereinafter "Salient Factor Score"), http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf.

[33] Breyer, *supra* note 26, at 19.

[34] Congress directed the Commission to assure that the guidelines were "entirely neutral" as to race, sex, national origin, creed, and socioeconomic status, and to reflect the "general inappropriateness" of education, vocational skills, employment record, family ties, community ties. *See* 28 U.S.C. §§ 994(d), (e). The Commission has prohibited consideration of drug or alcohol dependence and gambling addiction, §5H1.4, lack of guidance as a youth and similar circumstances indicating a disadvantaged background, § 5H1.12, personal financial difficulties or economic pressures on a trade or business, § 5K2.12, diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants, § 5K2.13, post-sentencing rehabilitation, § 5K2.19, a single aberrant act if the defendant had any "significant prior criminal behavior" even if so remote or minor that it was uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum, § 5K2.20; has strictly discouraged consideration of age, § 5H1.1, education and vocational skills, § 5H1.2, mental and emotional conditions, § 5H1.3, physical condition or appearance, § 5H1.4, employment record, § 5H1.5, family ties and responsibilities, § 5H1.6, and military, civic, charitable or public service, good works, § 5H1.11; and has erected multiple detailed requirements for consideration of victim's conduct, § 5K2.10, lesser harms, § 5K2.11, coercion and duress, § 5K2.12, diminished capacity, § 5K2.13, voluntary disclosure, § 5K2.16, and aberrant behavior, § 5K2.20.

judges surveyed in 2002 said that the guidelines infrequently met the goal of maintaining sufficient flexibility to permit individualized sentences, or of providing needed training, care or treatment in the most effective manner.[36]

On the other hand, the guidelines require rigid arithmetic increases for a vast and complicated array of aggravating offense characteristics. They purport to make relevant distinctions based on quantifiable "harms," while disregarding, restricting or prohibiting consideration of factors that bear on personal culpability, such as *mens rea*, motive, mistake and mental and emotional problems.[37] This works in one direction, as intended "harms" increase the sentence whether or not they occurred,[38] while "harms" that were unintended, unknown, fortuitous, or arranged by law enforcement are often counted.[39] The Commission "has never explained the rationale underlying any of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic."[40]

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[35] *See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (1988) ("With [the] specific exceptions" of § 5H1.10 (race, sex, national origin, creed, religion, socio-economic status), the third sentence of § 5H1.4 (drug dependence or alcohol abuse), and the last sentence of § 5K2.12 (personal financial difficulties and economic pressures on a trade or business), "the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.").

[36] U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapter II, available at http://www.ussc.gov/judsurv/judsurv.htm.

[37] *E.g.*, §§ 5H1.4, 5H1.12, 5K2.12, 5K2.13; § 2K2.1, comment. (n.16) (enhancement for stolen firearm or obliterated serial number regardless of knowledge or reason to believe the firearm was stolen or had an obliterated serial number); § 2J1.2 (12 level increase for false or misleading statement in connection with terrorism investigation regardless of whether the defendant knew it was a terrorism investigation).

[38] *See* § 1B1.3(a)(3) ("all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) . . . and all harm that was the object of such acts and omissions"); § 2D1.1, comment. (n.12) (total quantity attempted or agreed upon).

[39] *E.g.*, guidelines cited in note 37, *supra*; *United States v. Velasquez*, 28 F.3d 2 (2d Cir. 1994) (rejecting courier's argument that the weight of the heroin in her shoes was unforeseeable because foreseeability limitation applies only to drugs possessed or distributed by others); § 2D1.1, comment. (n.12) (burden on defendant to establish that he did not intend or was not capable of producing quantity agreed upon in reverse sting); *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004) (amount of loss involved in the fraud in many cases "is a kind of accident" and thus "a relatively weak indicator of the moral seriousness of the offense or the need for deterrence.").

[40] Jose Cabranes & Kate Stith, Fear of Judging: Sentencing Guidelines in the Federal Courts 69 (1998).

The one exception to the general rule against consideration of reduced personal culpability, role in the offense, is dwarfed by both the size of quantity-based aggravating factors and the large number of cumulative and often duplicative additional upward adjustments. The Commission limited the mitigating role adjustment to four levels because otherwise, guideline sentences might conflict with mandatory minimum sentences in some drug cases.[41] This is one example of how the drug trafficking guideline has driven up sentences in all cases, for reasons divorced from sentencing purposes, and there are others. *See* Part II(D), *infra*.

C. Two Decades of the One-Way Upward Ratchet

The original Commission estimated that its own policy decisions, as distinct from congressional mandates, would increase the prison population by 10% over ten years.[42] Since then, the Commission has amended the guidelines nearly 700 times, only a handful of which sought to reduce sentence severity.[43] By 2002, the guidelines alone (independent of mandatory minimum laws) accounted for 25% of the more than doubling of drug trafficking sentences, the tripling of immigration offense sentences, and the doubling of sentences for firearms trafficking and illegal firearms possession.[44] "Many offenses not subject to minimum penalty statutes have shown severity increases similar to offenses that are subject to statutory minimums."[45] The federal prison population has

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[41] Fifteen Year Report at 49.

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

[43] I count seven areas in which the Commission has attempted to or did reduce sentence severity. The Commission lessened the impact of "mixture or substance" in cases involving marijuana plants in 1991, *see* U.S.S.G., App. C, Amend. 396, and in cases involving LSD in 1993. *See* U.S.S.G., App. C, Amend. 488. In 1995, the Commission passed an amendment that would have reduced the 100:1 powder to crack ratio to 1:1 but was not passed by Congress; in 1997 and 2002, it recommended reducing the ratio without offering an amendment. In 1995, at Congress' direction, the Commission provided a two-level reduction for some offenders meeting safety valve criteria, expanded it to all qualified offenders in 2001, capped the quantity-based offense level at 30 for those who receive a mitigating role adjustment in 2002, but then increased the cap to 30, 31, 33, or 34 depending on the offense level, based on "concerns" about "proportionality" in 2004. *See* U.S.S.G., App. C, Amend. 515, 624, 640, 668. In 2000, the Commission provided a two-level reduction in intellectual property cases if the offense as not committed for commercial advantage or private financial gain, since the NET Act of 1997 provided lower statutory penalties in those cases. *See* U.S.S.G., App. C, Amend. 590. In 2001, the Commission reduced the enhancement for some aggravated felonies in § 2L1.2 from 16 to 12 or 8 levels, *see* U.S.S.G. App. C., amend. 632, and revised the money laundering guidelines by calibrating sentences to the seriousness of underlying criminal conduct. *See* U.S.S.G. App. C., amend. 634.

[44] Fifteen Year Report at 53-54, 64, 67, 139.

[45] *Id.* at 138.

more than quadrupled since the guidelines became law,[46] at a cost of $4.5 billion per year.[47] As of 2004, the Bureau of Prisons was 40% overcapacity,[48] despite Congress' directive "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."[49]

In 1999, Commission staff reported that average time served had doubled since the guidelines' inception, noted evidence that lengthy prison terms were being served by offenders with little risk of recidivism and without deterrent value, and recommended an evaluation of whether prison resources were being used effectively.[50] That same year, Justice Breyer gave a speech in which he criticized the "false precision" created by the guidelines, and called upon the Commission to "know when to stop," to "act[] forcefully to diminish significantly the number of offense characteristics," to "broaden[] the scope of certain offense characteristics, such as 'role in the offense,'" and to move in the direction of "greater judicial discretion" in order to provide "fairness and equity in the individual case."[51] Instead, the Commission has continued to amend the guidelines in a "one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules."[52]

Just three months before the Commission announced that the guidelines are a "mirror image" of 18 U.S.C. § 3553(a), its Fifteen Year Report acknowledged that much of the ever-increasing severity of the guidelines was due to real or perceived political pressure, admitted that it *still* had not determined whether the guidelines' increased

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[46] The federal prison population was 44,408 in 1986, 48,300 in 1987, *see* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988* Table 6.34, Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO, 1989, and is almost 190,000 today. *See* http://www.bop.gov/news/quick.jsp#1.

[47] *FY 2004 Costs of Incarceration and Supervision*, The Third Branch, Vol. 37, No. 5 (May 2005) ($23,205.59 per inmate in FY 2004), available at http://www.uscourts.gov/ttb/may05ttb/incarceration-costs/index.html.

[48] U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Prisoners in 2004* at 7, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf.

[49] 28 U.S.C. § 994(g).

[50] Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999).

[51] Breyer, *supra* note 31, at **10-11.

[52] *See* Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005). *See also* Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heartland: The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723 (1999).

severity achieves sentencing purposes, and suggested that penalties *could be* reduced to better achieve sentencing purposes and to relieve prison overcrowding.[53]

Judges, past Commissioners, Commission staff, former prosecutors and academics have persistently criticized the guidelines' disproportionate severity, ineffectiveness and inefficiency.[54] Most recently, the Justice Kennedy Commission, Justice Kennedy himself, and the Constitution Project's bipartisan Sentencing Initiative, have called upon the Commission to reduce guideline sentences because they are unjust, ineffective, and inefficient.[55]

Given the vast array of aggravating factors, the over-emphasis on quantity-based "harms," and the neglect of personal culpability and other mitigating factors, the guideline sentence is very likely to be greater than necessary to satisfy sentencing purposes in most cases. Likewise, it should be very difficult for the government to argue,

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[53] Fifteen Year Report at 77, 137-140, Executive Summary at vi, xvii. *See also* the following articles cited in the Fifteen Year Report at 138, which recount a history of the Commission acting in response to pressure from law-and-order interests within and outside the Commission, rather than data and the purposes of sentencing. *See* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289 (1989); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001 (2001); Aaron Rappaport, *The State of Severity*, 12 Fed. Sent. R. 3 (July/August 1999); Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines, Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 752 (2001).

[54] *E.g.*, Fifteen Year Report at 50, 52, 55, 82, 137; Frank O. Bowman III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. Chi. Legal F. 149, 165-66 & nn. 105-06 (2005); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 24, 33-35, 68-73 (2003); Breyer, *supra* note 31 at **10-11; Michael Tonry, Sentencing Matters 78-79 (Oxford 1996); U.S. Sentencing Commission, *White Collar Working Group Report* 8 (April 1993); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992); U.S. Sentencing Commission, *Report of the Drugs/Role/Harmonization Working Group* 60 (Nov. 10, 1992); United States General Accounting Office, *Report to Congressional Committees, Sentencing Guidelines: Central Questions Remain Unanswered* at 151-52 (August 1992); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 921 (1991).

[55] Report of the ABA Justice Kennedy Commission, Summary of Recommendations, http://www.abanet.org/media/kencomm/summaryrec.pdf; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting at 4 (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; Constitution Project, Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 32-34 (June 7, 2005).

or the sentencing court to find, that the guideline range fails to take account of any aggravating factor or is insufficient to satisfy sentencing purposes.[56]

D. Unwarranted Disparity and Excessive Uniformity Fostered by the Guidelines

After *Booker*, the government and many courts cite the need for "uniformity" to justify *de facto* mandatory guidelines. One answer to this is that the Supreme Court ruled in *Booker* that "the uniformity that Congress originally sought to secure . . . is no longer an open choice" under the Sixth Amendment.[57] However, many courts are unmoved by this basic constitutional point, and seem to believe that the guidelines actually reflect the kind of uniformity the original Congress sought to secure and actually avoid unwarranted disparity. In fact, the guidelines reflect an excessive uniformity and rigidity that Congress did not intend, and have fostered unwarranted disparity. Justice Breyer knows this, as evidenced by his 1999 speech. *See* Part I(C), *supra*. That presumably is why, in *Booker*, he urged the Commission to "modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices," in order to "thereby promote uniformity in the sentencing process."[58]

1. The guidelines preclude the "comprehensive examination of the particular offense and offender" intended by Congress to avoid *unwarranted* disparity.

Congress directed the Commission to "avoid[] unwarranted disparities among defendants with similar records who have been found guilty of similar conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[59] As the 1977 Senate Judiciary Committee Report explained, "the key word in discussing unwarranted sentence disparities is 'unwarranted'" and the "Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records."[60]

As the 1983 Senate Judiciary Committee Report explained: "The Committee does not intend that the Guidelines be imposed in a mechanistic fashion. It believes that

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[56] *E.g.*, *United States v. Zapete-Garcia*, 447 F.3d 57 (1st Cir. 2006) (reversing upward variance because guidelines already took reasons into account); *United States v. Kendall*, 446 F.3d 782 (8th Cir. 2006) (same).

[57] *Booker*, 543 U.S. at 263-64.

[58] *Id.* at 263.

[59] 28 U.S.C. § 991(b)(1)(B).

[60] S. Rep. No. 95-605 at 1161 (1977).

the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appropriate case. The purpose of the Sentencing Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. . . . [T]he judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. . . . This will assure that the . . . sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature."[61]

Since the Sentencing Reform Act was enacted, the Commission has eliminated any "comprehensive examination of the characteristics of the particular offense and the particular offender," and hence "informed comparisons" among cases. Using the guidelines as the benchmark of disparity is therefore contrary to congressional intent even under the original SRA.

2. Unwarranted disparity is built into the guidelines.

The Commission acknowledges that it has "only partially achieved" the goal of avoiding unwarranted disparities while maintaining sufficient flexibility to permit warranted differences.[62] Many observers say it has utterly failed.[63] Unwarranted disparity and unwarranted uniformity, two sides of the same coin, are discussed in the context of particular guidelines in Part II, *infra*. This section discusses rules that the Commission has found to produce racial disparity without serving sentencing purposes (regardless of the defendant's race), and the persistence of and increase in regional disparity under the guidelines primarily as a result of prosecutorial practices. Insistence on following the guidelines in order to achieve national uniformity perpetuates the unwarranted disparity built into the guidelines.

a. Rules that do not serve sentencing purposes but create racial disparity

According to the Fifteen Year Report, racial disparity is "built into the sentencing rules themselves rather than a product of . . . discrimination on the part of judges. . . . [The] increasingly severe treatment of . . . particularly, drug offenses and repeat offenses, has widened the gap. . . . Today's sentencing policies, crystallized into sentencing guidelines and mandatory minimum statutes, have a greater adverse impact on Black

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[61] S. Rep. No. 98-225, 98th Cong., 1st Sess. 52-53 (1984).

[62] Fifteen Year Report at 142-143.

[63] *E.g.*, Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 Stan.L.Rev. 85 (2005); Michael O'Hear, *The Myth of Uniformity*, 17 Fed. Sent. Rep. 249, 2005 WL 2922200 (April 2005).

offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[64]

The sentencing disparity between white and minority offenders, which was small in the pre-guideline era, has widened considerably since the guidelines went into effect. By 1994, the number of months of imprisonment for Black offenders was nearly double that for whites, and has narrowed only slightly since then.[65] "A significant amount of the gap" is due to "the adverse impact of current cocaine sentencing laws" and "the harsher treatment of drug trafficking, firearm, and repeat offenses."[66]

Rules identified by the Commission that create racial disparity but are not a "necessary and effective means to achieve the purposes of sentencing" are mandatory minimum penalties, 924(c) enhancements, the drug trafficking guidelines, the relevant conduct rules, the 100:1 powder to crack ratio, the career offender guideline, and the inclusion of non-moving traffic violations and other minor offenses in the criminal history score.[67]

b. Unwarranted regional and racial disparity resulting from the government's unreviewable discretion

Regional disparity persists under the guidelines, and has even increased for drug trafficking offenses.[68] Considerable regional variation results from "uneven charging and plea bargaining" in the filing of § 851 notices, § 924(c) charges, and mandatory minimum charges, the use of fast track dispositions, and motions under U.S.S.G. § 5K1.1, § 3E1.1(b), 18 U.S.C. § 3553(e) and Rule 35(b).[69] Prosecutorial "charging decisions disproportionately disadvantage minorities."[70]

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[64] Fifteen Year Report at 135.

[65] *Id.* at 115-16, 120-27.

[66] *Id.* at 117.

[67] *Id.* at 47-55, 76, 113-14, 131-134, 141. *See also* U.S. Sentencing Commission, *Report to Congress – Cocaine and Federal Sentencing Policy* (May 2002) (hereinafter "2002 Cocaine Report"); U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 29, 1997); *U.S. Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy* (February 1995), all available at http://www.ussc.gov/reports.htm; U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991) (hereinafter "1991 Mandatory Minimum Report"), http://www.ussc.gov/r_congress/MANMIN.PDF.

[68] Fifteen Year Report at 94, 98, 140.

[69] *Id.* at 84-85, 89-92, 102, 103, 106, 111-12, 141-42.

[70] *Id.* at 91.

"Among discretionary mechanisms within the guidelines system, substantial assistance departures contribute the greatest amount to variation in sentences."[71] Rates vary widely among districts, and research shows that African American offenders consistently receive substantial assistance departures at a lower rate.[72] The Commission has concluded that "factors . . . associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity." Legally irrelevant factors including race, gender, ethnicity and citizenship are "statistically significant in explaining §5K1.1 departures," while legally relevant factors such as the type or benefit of cooperation, defendant culpability and offense type "generally were found to be inadequate in explaining §5K1.1 departures." The government's reasons for making or withholding substantial assistance departures are not made available for review. "It is exactly such a lack of review, inherent in preguideline judicial discretion, that led to charges of unwarranted disparity and passage of the SRA."[73]

Note that after *Booker*, courts may consider cooperation without a government motion, though it may invite a government appeal. The government has argued that this is contrary to congressional intent, but the guidelines, not the statute, require a government motion (except to get below a mandatory minimum).[74] The Eleventh Circuit has held that judges may not consider cooperation without a government motion,[75] the Second Circuit has held that judges may where the defendant's cooperation or efforts to cooperate are relevant to the defendant's character (*e.g.*, remorse and rehabilitation), and the purposes of sentencing (*e.g.*, the likelihood of rehabilitation, the necessity for individual deterrence, a reduced need for punishment),[76] and the Eighth Circuit has held that they may and even must to correct unwarranted disparity between co-defendants.[77]

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[71] *Id.* at 102, 141.

[72] *Id.* at 103-05, 141.

[73] U.S. Sentencing Commission, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20-21 (1998).

[74] *Compare* U.S.S.G. § 5K1.1 (government motion required) *with* 28 U.S.C. § 994(n) (no mention of government motion) *with* 18 U.S.C. § 3553(e) (government motion required for departure below mandatory minimum).

[75] *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005).

[76] *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006).

[77] *United States v. Krutsinger*, 449 F.3d 827 (8th Cir. 2006); *United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006).

E. Politically Unaccountable

The Tenth Circuit recently attempted to reconcile the inconsistency between the "democratic spirit" of the Sixth Amendment and the use of "presumptively reasonable" guidelines without a right to jury trial by claiming that the Sentencing Commission is a "politically accountable body" and the guidelines "are an expression of popular political will."[78]

The Sentencing Commission is the least politically accountable of all administrative agencies, which explains why the guidelines bear so little resemblance to their enabling legislation.[79] The Commission's proposed amendments are subject to a notice and comment period,[80] but not to the other requirements of the Administrative Procedures Act, most notably judicial review. The Commission deliberates in secret, its actions need not be rational or justified on the basis of a record, and it need not even address issues raised in public comment. It rarely attempts to justify guideline amendments, and what explanations it gives are conclusory and inadequate.[81] While the Commission is required to consult with "authorities on, and individual representatives of the Federal criminal justice system," including the judiciary and the defense bar,[82] input that conflicts with the wishes of DOJ is usually ignored.[83] Moreover, DOJ, which has an *ex officio* representative on the Commission, and other law enforcement agencies, communicate with the Commission in secret.[84] Other stakeholders cannot respond to these communications, rendering the notice and comment period ineffective.

F. Contrary to Public Opinion

In a related vein, it has been suggested that the guidelines should be given heightened deference after *Booker* based on a public opinion poll conducted by Professors Rossi and Berk under contract with the Sentencing Commission in the mid-

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[78] *United States v. Cage*, 451 F.3d 585 (10th Cir. 2006).

[79] Joseph W. Luby, *Reining in the" Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U. L.Q. 1199, 1228 (1999); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 Cal. L. Rev. 1, 5 (1991); Stith & Cabranes, *supra* note 40, at 57.

[80] 28 U.S.C. § 994(x).

[81] Miller & Wright, *supra* note 52, at 802-803; Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 390 (2004); Stith & Cabranes, *supra* note 40, at 69.

[82] 28 U.S.C. § 994(o).

[83] *E.g.*, Bowman, *supra* note 52, at 1336-1341.

[84] U.S. Sentencing Commission, Rules of Practice and Procedure, Rules 3.3, 5.1, available at http://www.ussc.gov/general/rules11_01.pdf.

1990s,[85] which purportedly showed a "fair amount of agreement between sentences prescribed in the guidelines and those desired by the members of the sample."[86]

As the original Commission recognized, public opinion polls are an inherently poor way to set or measure sentencing policy.[87] In any event, the Rossi and Berk study showed significant disagreement on the part of survey respondents with the severity of sentences produced by the most frequently applied guidelines, even before the further increases over the past ten years. Among other things, the guidelines produced "much harsher" sentences in drug trafficking cases than survey respondents would have given. Respondents did not support the drastic increases under "habitual offender" rules like the career offender guideline. Respondents gave less weight to economic loss than the guidelines did, and less severe sentences for immigration offenses, bribery, civil rights offenses and environmental crimes.[88]

II. The Most Frequently Applied Guidelines Produce Sentences that are Greater Than Necessary to Satisfy Sentencing Purposes.

The following are some of the ways in which the most frequently applied guidelines fail to satisfy sentencing purposes and create unwarranted disparity.

A. "Real Conduct"

As several commentators and some judges have observed, the *Booker* remedy is internally inconsistent (in throwing out mandatory guidelines in favor of the "uniformity" achieved by "real conduct" found on the basis of presentence reports) and did not address the constitutional violation ("remedying" judicial factfinding with judicial factfinding), all in pursuit of preserving the "real conduct" sentencing that invited the constitutional holding.[89] The problem boils down to a fundamental disagreement over how "real

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[85] Peter H. Rossi & Richard A. Berk, U.S. Sentencing Commission, Public Opinion on Sentencing Federal Crimes (1997) (hereinafter "Rossi & Berk"), http://www.ussc.gov/nss/jp_exsum.htm.

[86] *United States v. Wilson*, 350 F.Supp.2d 910, 917 (D. Utah 2005).

[87] Breyer, *supra* note 26, at 16 & n.84. *See also* Michelle D. St. Armand & Edward Zamble, *Impact of Information About Sentencing Decisions on Public Attitudes Toward the Criminal Justice System*, 25 L. & Hum. Behav. 515, 516-17, 525 (2001) (research shows that when surveyed in the abstract, respondents "tend to think of hardened and vicious criminals rather than the typical offender," and that severity of sentences reported in the news conditions attitudes about sentence length).

[88] Rossi & Berk, *supra* note 85.

[89] Michael W. McConnell, *The Booker Mess*, 83 Denver U. L. Rev. 665 (2006); David J. D'Addio, *Sentencing After Booker: The Impact of Appellate Review on Defendants' Rights*, 24 Yale L. & Pol'y Rev. 173 (2006); Frank O. Bowman, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 Chi. Legal F. 149, 182 (2005); M.K.B.

conduct" sentencing works in practice and its implications for our constitutional structure. The fate of *de facto* mandatory guidelines will likely depend on whether Justice Breyer can again "scrape together" a majority for his view.[90]

The five justices in the majority in *Blakely* and in the constitutional majority in *Booker* (Stevens, Scalia, Souter, Thomas and Ginsburg, all still on the Court) were deeply disturbed that the guidelines required the equivalent of conviction for uncharged, dismissed and acquitted crimes without the fundamental components of the adversary system the Framers intended, *i.e.*, notice, jury trial, and proof beyond a reasonable doubt.[91] They held that "real conduct" sentencing is an "assault" on the Sixth Amendment's "fundamental reservation of power" in the people within "our constitutional structure."[92] "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."[93] If the Sixth Amendment issue had been raised in *Witte v. United States*, 515 U.S. 389 (1995) (upholding uncharged conduct against double jeopardy challenge) and *United States v. Watts*, 519 U.S. 148 (1997) (upholding acquitted conduct against double jeopardy challenge), these justices would have decided those cases differently.[94] Further, these justices are aware that the "facts" of uncharged, dismissed and acquitted offenses are determined unfairly and unreliably, *i.e.*, without notice by indictment or plea, based on "hearsay-riddled presentence reports" prepared by probation officers who the judge thinks "more likely got it right than got it wrong."[95] This "'non-adversarial' truth-seeking process" is "an assault on jury trial generally."[96]

Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. Rev. 533, 564 (2005); *Kandirakis*, 2006 WL 2147610 at **4-11.

[90] *Id.* at *13.

[91] *See Blakely*, 542 U.S. at 306 (not even *Apprendi*'s critics can support the "absurd result" of a man being sentenced "for committing murder, even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene"); *id.* at 307 (Blakely was sentenced based on the "very charge" that was dismissed pursuant to his guilty plea); *Booker*, 543 U.S. at 273 (noting that Booker was sentenced on the basis of uncharged crimes) (Stevens, J., dissenting in part).

[92] *Blakely*, 542 U.S. at 305-08, 313.

[93] *Id.* at 307 (emphasis in original).

[94] *Booker*, 543 U.S. at 240.

[95] *Id.* at 304 (Scalia, J., dissenting in part); *Blakely*, 542 US at 311-12.

[96] *Blakely*, 542 U.S. at 312-13.

In contrast, Justice Breyer describes "real conduct" as merely about the "way in which" the offense of conviction was committed. In his view, stunningly uninformed by actual practice over the past twenty years, "real conduct" sentencing is based on "factual information" contained in a "presentence report" which is "uncovered after trial," is determined "fairly" by probation officers, avoids the transfer of power from judges to prosecutors, and somehow avoids unwarranted disparity better than would adversarial testing before a jury.[97] Though Justice Ginsburg inexplicably signed on to this description in the remedy opinion, her dissent in *Recuenco, supra*, indicates that her position on "real conduct" sentencing under a *de facto* mandatory guideline system has not changed.

As Justice Stevens observed, "the [remedy] majority's concerns about relevant conduct are nothing more than an objection to *Apprendi* itself, an objection this Court rejected in Parts I-III. . . . [T]he goal of such sentencing-increasing a defendant's sentence on the basis of conduct not proved at trial-is contrary to the very core of *Apprendi*."[98]

Justice Breyer's arguments are no more than wishful policy theories that can easily be discredited based on the Commission's own studies, critiques by experts in the field, and the facts of typical cases.[99] He has never confronted the fact that the guidelines' relevant conduct rules go well beyond facts about "the way in which" the offense of conviction was committed to full-blown separate offenses.[100] The Commission characterizes these rules, which *were not required or even suggested by Congress*, as "an admitted policy compromise."[101] The "compromise" was radical and one-sided. As Commission staff have pointed out, unlike some state guideline systems that permit the use of *some* facts beyond the offense of conviction and only within a grid that caps the sentence based on the offense of conviction, under the federal guidelines, separate offenses of which the defendant was never charged or convicted add to the sentence at the same rate as if the defendant was charged and convicted.[102] Further, the

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[97] *Booker*, 543 U.S. at 250-57, 326, 327-29.

[98] *Id.* at 288 (Stevens, J., dissenting in part).

[99] *See* examples in the Appendix to Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission (July 19, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/ defender _letter_to_ussc_71906.pdf.

[100] *United States v. Faust*, __F.3d __, 2006 WL 2035467 **5-10 (11th Cir. July 21, 2006) (sentencing on the basis of acquitted facts that "constitute entirely free-standing offenses under the applicable law" violates the Fifth and Sixth Amendments) (Barkett, J., specially concurring).

[101] Fifteen Year Report at 144.

[102] U.S. Sentencing Commission, *Relevant Conduct and Real Offense Sentencing* (Staff Discussion Paper, 1996), http://www.ussc.gov/SIMPLE/relevant.htm.

most frequently applied guidelines (drugs, economic crimes, firearms) require inclusion of uncharged, dismissed and acquitted offenses. And the guidelines now contain nearly 100 cross references to more serious offenses, the application of which often results in the equivalent of conviction for offenses over which the federal courts have no jurisdiction. Before and after *Booker*, defendants are regularly convicted of separate and greater crimes, without notice, jury trial, admissible evidence, or proof beyond a reasonable doubt, or contrary to the jury's verdict.[103]

Also contrary to Justice Breyer's portrayal, the Commission and many experts have found that the relevant conduct rules result in unfairness and inaccuracy, and have not avoided unwarranted disparity or the transfer of power to prosecutors, but just the opposite:

First, the "real conduct" system results in the equivalent of conviction based on facts that often are not real at all. According to the Commission, "research suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators."[104] Most probation officers incorporate the prosecutor's written version of the facts or law enforcement reports directly into the PSR.[105] In some circuits, the mere inclusion of

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[103] *E.g.*, *Faust*, 2006 WL 2035467 (possession of ecstasy and possession of a firearm of which defendant was acquitted were merely about the "manner in which" he committed cocaine trafficking offense of which he was convicted); *United States v. Rashaw*, 170 Fed. Appx. 986 (8th Cir. 2006) (affirming statutory maximum sentence of 30 years for defendant convicted of firearms offenses based on uncharged double homicide to which firearms were unrelated); *United States v. Price*, 418 F.3d 771 (7th Cir. 2005) (affirming 360-month sentence for defendant convicted of drug trafficking offense subject to 27-33 month guideline sentence based on conduct of others in conspiracy of which he was acquitted); *United States v. Jardine*, 364 F.3d 1200 (10th Cir. 2004) (affirming 108-month sentence for defendant convicted of firearms possession subject to 18-24 month guideline sentence based on uncharged drug trafficking offense to which the firearm was unrelated); *United States v. Lombard*, 102 F.3d 1 (1st Cir. 1996) (affirming life sentence for defendant convicted of firearms offense based on a murder of which he was acquitted in state court); *United States v. Vernier*, 335 F. Supp.2d 1374 (S.D. Fla. 2004) (departing upward from sentence based on conviction of fraudulent money withdrawal based on suspicion of uncharged murder), *aff'd in part, vacated in part on other grounds*, 152 Fed. Appx. 827 (11th Cir. Oct. 11, 2005).

[104] Fifteen Year Report at 50. *See also* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. Rev. 211, 222 (2004) (discussing "increase in 'dry conspiracies' where no drugs were ever seized by the police and the conviction and sentence depended entirely on the dubious testimony of cooperating witnesses, even when many of these had been higher up in the chain than the defendant on trial.").

[105] Fifteen Year Report at 84, 86; Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission, Memorandum at 21 (July 19, 2006), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/ defender _letter_to_ussc_71906.pdf..

factual allegations in a PSR transforms them to "evidence," which relieves the government of introducing actual evidence and shifts the burden to the defendant to disprove it.[106]

"In truth, 'real conduct' sentencing as embodied in the Guidelines, is simply punishment for acts not constitutionally proven. The system relies on 'findings' that rest on 'a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice]. If the Sentencing Reform Act 'depends for its success upon judicial efforts to' administer this scheme and its faux findings, then the Act's success ought not to be desired."[107] The *Booker* remedy "continues to provide safe harbor for the imaginative fantasies of what really occurred under the rubric of real conduct."[108]

Second, "real conduct" is the source of disproportionate severity and unwarranted uniformity. It exacerbates the guidelines' over-emphasis on quantity and neglect of personal culpability, creating sentences that are vastly disproportionate to culpability and resulting in unwarranted uniformity among unlike offenders.[109] In drug cases, it punishes offenders in excess of Congress' intent in enacting the mandatory minimum statutes of focusing on major and serious traffickers based on quantities possessed, controlled, directed or handled by the individual defendant in the offense of conviction. *See* IV(B), *infra*. Further, concepts of "foreseeability" and "jointly undertaken activity" are applied in a manner that obliterates important distinctions in culpability.[110]

Third, "real conduct" results in unwarranted disparity. It is not consistently applied because of "ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result."[111] In a sample test administered by Commission researchers for the Federal Judicial Center, probation officers applying the relevant conduct rules

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[106] *See United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990).

[107] *Kandarakis*, 2006 WL 2147610 at *13 (citations omitted).

[108] Dan Markel, *The Indispensable Berman on Booker*, June 26, 2006, available at http://prawfsblawg.blogs.com/prawfsblawg/2006/06/the_indispensab.html.

[109] Fifteen Year Report at 50, 52. *See also, e.g.*, Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 32-34 (June 7, 2005).

[110] Stephen J. Schulhofer, *Excessive Uniformity and How to Fix It*, 5 Fed. Sent. Rep. 169, 1992 WL 439725 **2-3 (Nov./Dec. 1992).

[111] Fifteen Year Report at 87.

sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, 37 to 136 months for the second defendant, and 24 to 136 months for the third defendant.[112]

Prosecutors, judges and defense counsel circumvent the rules because they feel they are unjust.[113] Circumvention can result in sentences that "are better suited to achieve the purposes of sentencing than the sentence that would result from strict adherence to every applicable law," but those decisions are controlled by prosecutors and only benefit some defendants and not others. This results in unwarranted disparity and sentences that are often disproportionate to the seriousness of the offense.[114]

Fourth, "real conduct" transfers power to prosecutors, not away from them. The relevant conduct rules and cross references were based on concerns that a charge system would transfer power to prosecutors and thereby increase disparities,[115] but, since prosecutors control the "facts," the rules "are not working as intended," and "tend to work in one direction," *i.e.*, to the disadvantage of defendants.[116] Rather than preventing prosecutors from controlling sentencing outcomes, "real conduct" has transferred sentencing power to prosecutors.[117]

The relevant conduct rules invite prosecutors to obtain, or threaten to obtain, the equivalent of a conviction on charges that cannot be proved with competent evidence but are impossible to challenge. If the charges were brought, the defendant would have notice, discovery, and the right to cross-examination and proof beyond a reasonable doubt. If charges are not brought or dropped, they can be "proved" in a presentence report. The government need not produce the purported source of the information in court, the defendant has no right to cross-examine the purported source, and often the source is not even identified. In this way, the burden is effectively or explicitly shifted to the defendant. If the defendant contests the allegations, he may lose an acceptance of responsibility reduction and even receive an enhancement for obstruction of justice.[118] Thus, "real conduct" makes it far easier to obtain the equivalent of a conviction than to

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[112] *See* Lawrence & Hofer, *supra* note 109.

[113] Fifteen Year Report at 32, 87.

[114] *Id.* at 82, 141-42.

[115] *Id.* at 25-27.

[116] *Id.* at 92.

[117] *Id.* at 86; Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* 33 (June 7, 2005)

[118] Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 Cal. L. Rev. 425 (2004).

bother with the adversarial testing the Framers had in mind.[119] With this awesome power in hand, prosecutors can and do extract agreements to dubious enhancements or guilty pleas from defendants who would otherwise be acquitted.[120] "The inducement to plead guilty may be irresistible even to a defendant with a strong defense or who is actually innocent."[121]

B. Drug Offenses

Increased sentence length for drug offenses has been "the major cause of federal prison population growth" since the guidelines' inception, and a "primary cause" of racial disparity in sentencing.[122] The Commission rightfully has condemned mandatory minimum penalties for creating disproportionate severity, unwarranted uniformity, and unwarranted disparity,[123] but the Commission has unnecessarily exacerbated these problems. Since the early 1990s, the Commission has received a stream of evidence from its own research staff, other experts, judges, and even the Department of Justice and the Bureau of Prisons that the guidelines produce sentences in drug cases that are far greater than necessary to achieve sentencing purposes, result in unwarranted disparity, and require excessive uniformity.

Thirty-one percent of judges surveyed in 2002 listed drug sentencing as "the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing," with "73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of

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[119] Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1714 (1992); Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. Rev. 649, 670 (2003); M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C.L. Rev. 533, 569-71 (2005).

[120] Michael O'Hear, *The Original Intent of Uniformity in Sentencing*, 74 U. Cin. L. Rev. 749, 809 & n.304 (2006).

[121] American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1492-93 (2001). *See also* David Yellen, *Illusuion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 449 (1993); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 274 (1989).

[122] Fifteen Year Report at 47-48, 76.

[123] *Id.* at 15, 22. *See also* 1991 Mandatory Minimum Report, *supra* note 67; 2002 Cocaine Report, *supra* note 67.

drug trafficking offenses."[124] Before *Booker*, prosecutors and judges often circumvented the guidelines in drug cases to mitigate their harshness and inflexibility.[125] Judges can now correct what the Commission has not. After *Booker*, the rate of below-guideline sentences in all types of drug cases has increased markedly.[126]

1. What Congress Intended

In enacting the Anti-Drug Abuse Act of 1986 (ADAA), Congress intended to create a two-tiered penalty structure aimed at "discrete categories of traffickers": a ten-year mandatory minimum for "major" traffickers, *i.e.*, "manufacturers or the heads of organizations," and a five-year mandatory minimum for "serious" traffickers, *i.e.*, "managers of the retail traffic."[127] Congress selected quantities of particular drugs possessed, controlled, directed or handled by the defendant as a proxy to identify "major" and "serious" traffickers:

> The Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are *responsible for creating and delivering very large quantities of drugs*. After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if *possessed by an individual* would likely be indicative of operating at such a high level. . . . The quantity is based on the minimum quantity that might be *controlled or directed by a trafficker in a high place* in the processing and distribution chain. . . . The Committee determined that a second level of focus ought to be on the managers of the retail level traffic, the person who is *filling the bags* of heroin, *packaging* crack into vials or *wrapping* pcp in aluminum foil, and doing so *in substantial street quantities*.[128]

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[124] Fifteen Year Report at 52, citing U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines* (Feb. 2003), available at http://www.ussc.gov/judsurv/judsurv.htm.

[125] Fifteen Year Report at 54-55. *See also* Frank O. Bowman and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L. Rev. 477, 479-83 (January 2002).

[126] Booker Report at 128.

[127] 2002 Cocaine Report, *supra* note 67, at 5-7 (reviewing legislative history); Fifteen Year Report at 48-49 (same); 132 Cong. Rec. 27,193-94 (daily ed. Sept. 30, 1996); 132 Cong. Rec. 22,993 (daily ed. Sept. 11, 1986); H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596.

[128] H.R. Rep. No. 99-845, 99th Cong., 2d Sess. 1986, 1986 WL 295596 (Background) (emphasis supplied).

A "major goal" of the legislation was "to give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources."[129] However, the quantities were set at such low levels that the majority of federal drug defendants are street-level dealers or mules.[130] Further, unlike the Parole Commission which set release dates based on the quantity of the pure drug, Congress used the weight of a "mixture or substance containing a detectable amount" of the drug.[131]

2. Severity Broadened and Increased by the Commission

The Sentencing Commission exacerbated the problems inherent in the statute in several ways.

First, the Commission extended the ADAA's quantity-based approach across 17 levels, resulting in increased punishment below, between and above the statutory levels.[132] This went "well beyond those judgments that flow naturally from deference to congressional decisions."[133] The Commission gave no contemporaneous explanation for doing so, which "is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population."[134]

Second, the Commission added a variety of aggravating factors that increase the guideline sentence above that dictated by quantity. Some of these double count aspects that Congress thought would be reflected in quantity, for example aggravating role in any type of drug case, presence of a weapon and use of a minor in crack cases.[135]

Third, as noted above, the Commission decided not to give more weight to mitigating role in the offense and other potentially significant factors because if so, guideline sentences might conflict with mandatory minimum sentences in some cases.[136]

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[129] *Id.*

[130] Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 Vill. L. Rev. 383, 408-412 (1995).

[131] Fifteen Year Report at 48.

[132] *Id.* at 50.

[133] Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 853 (1992).

[134] Fifteen Year Report at 49.

[135] 2002 Cocaine Report, *supra* note 67, at 9-10.

[136] Fifteen Year Report at 49.

Fourth, the Commission adopted a definition of "relevant conduct" that exceeds Congress' intent to focus on major and serious traffickers based on quantities possessed, controlled, directed or handled by the individual defendant in the offense of conviction. It increases the sentence based on amounts involved in separate transactions of which the defendant was not convicted and amounts merely "reasonably foreseeable" to the defendant in "jointly undertaken criminal activity." Application of the relevant conduct rule can exceed congressional intent even in transactions in which the defendant was involved and convicted. For example, a defendant who helped offload a single shipment can be sentenced "well in excess of the ten-year mandatory minimum penalty," though "it cannot be said that Congress required . . . more than ten years imprisonment" in such a case.[137]

The Commission's actions resulted in prison terms "far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes."[138] The Commission initially estimated that the drug guidelines would add only one additional month to prison sentences, but as of 2001, over 25% of the average prison sentence for drug offenders was attributable to guideline increases above mandatory minimum penalties.[139]

3. Severity Disproportionate to the Seriousness of the Offense, Unwarranted Uniformity, Unwarranted Disparity

By elevating the impact of quantity to the exclusion of offense circumstances and offender characteristics pertinent to personal culpability, the guidelines overstate the seriousness of the offense even from a pure "just deserts" perspective.[140] The quantity-

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[137] U.S. Sentencing Commission, *Report of the Drugs/Role Harmonization Working Group* 2-3 (Nov. 10, 1992) (hereinafter "1992 USSC Drug Report").

[138] Fifteen Year Report at 49.

[139] *Id.* at 54.

[140] *See* Fifteen Year Report at 50 (quantity a "particularly poor proxy for the culpability of low-level offenders . . . who do not share in the profits or decision-making"); Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chic. L. Rev. 901 (1991) (guidelines disregard factors that are important from a just deserts perspective in favor of "harm" only because it is easier, on the surface, to quantify); Hofer & Lawrence, *An Empirical Study of the Application of the Relevant Conduct Guidelines § 1B1.3*, 4 Fed. Sent. Rep. 330, 1992 WL 195017 (May/June 1992) (sentences imposed are "vastly disproportionate to the defendant's culpability" when based on amounts involved in a conspiracy in which the defendant played a minor part); Stephen Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-57 (1992) ("Drug quantity, which should count as one among many sentencing factors, and not the most important one at that, becomes the only sentencing factor."); 1992 USSC Drug Report, *supra* note 126, at 51 (discussing need for "a greater reduction for mitigating role"); Judicial Conference of the United States, *1995 Annual Report of the JCUS to the U.S. Sentencing Commission* 2 (1995) ("[T]he

driven rules "mandate inequity" and "excessive uniformity" by "requiring that different cases be treated alike."[141] The rules make arbitrary distinctions among offenders, creating a false precision.[142] It is doubtful that quantity can "be determined with sufficient precision to justify seventeen meaningful distinctions," and "arbitrary variations due to the weight of inactive ingredients remain."[143] Quantity "is often opportunistic," and can result in "inequity and unfairness."[144] Manipulation of sentencing factors by prosecutors and police (*e.g.*, inducement to cook the powder, repeated transactions, transactions in a prohibited location) is a "significant source of continuing disparity in the federal system."[145] As noted above, there are "significant disparities" in how the relevant conduct rules are understood and applied, and it is questionable that disputes over drug quantity could ever be consistently applied, since they "must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators."[146]

Inexplicably, the Commission has encouraged *upward* departure in the event drug quantity happens to understate offense seriousness, but has not invited *downward* departures,[147] though "these are the guidelines most in need of rationalizing interpretation."[148]

4. Ineffective Sentences Not Worth the Financial and Human Cost

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Judicial Conference ... encourages the Commission to study the wisdom of drug sentencing guidelines which are driven virtually exclusively by the quantity or weight of the drugs involved").

[141] *See* Schulhofer, *supra* note 140, at 851-57. *See also* Alschuler, *supra* note 140, at 919-21 (guidelines require same treatment of a runner and his supplier); Steven B. Wasserman, *Toward Sentencing Reform for Drug Couriers*, 61 Brooklyn L. Rev. 643 (1995) (same regarding couriers).

[142] Hofer & Allenbaugh, *supra* note 54, at 24.

[143] Fifteen Year Report at 50.

[144] 1992 USSC Drug Report, *supra* note 137, at 51, 60.

[145] Fifteen Year Report at 82.

[146] *Id.* at 50.

[147] *Id.*

[148] Hofer & Allenbaugh, *supra* note 54, at 79.

Today, 55% of federal prisoners are serving time for a drug offense.[149] Contrary to congressional intent in enacting the ADAA, over 50% are in Criminal History Category I, and at least 83% had no weapon involvement.[150] Only 17.1% of federal cocaine traffickers are classified as high-level offenders, 70% are low-level, and the other 12.4% are in between.[151]

A study published by the Department of Justice in 1994 found that a substantial number of federal drug offenders played minor functional roles, had engaged in no violence, and had minimal or no prior contacts with the criminal justice system. Though these offenders "are much less likely than high-level defendants to re-offend" and "a short prison sentence is just as likely to deter them from future offending as a long prison sentence," they "still receive sentences that overlap a great deal with defendants who had much more significant roles in the drug scheme." DOJ concluded that the resources expended on these offenders "could be used more efficiently to promote other criminal justice needs."[152] A recidivism study published by a Bureau of Prisons researcher in 1994 concluded that for the 62.3% of federal drug trafficking prisoners who at that time were in Criminal History Category I, guideline sentences were costly to taxpayers, had little, if any, incapacitation or deterrent value, and were likely to negatively impact recidivism.[153]

In 1995, a RAND Corporation working group recommended that the "U.S. Sentencing Commission should review its guidelines to allow more attention to the gravity of the offense and not simply to the quantity of the drug," because "[f]ederal sentences for drug offenders are often too severe: they offend justice, serve poorly as drug control measures, and are very expensive to carry out."[154] In 1999, Commission research staff reported that the Bureau of Prisons had found that drug trafficking offenders were less likely to recidivate than the average federal offender, and that their

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[149] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7 (2005) (hereinafter "*Incarceration and Crime*"), available at http://www.sentencingproject.org/pdfs/incarceration-crime.pdf.

[150] Fifteen Year Report at 54-55; U.S. Sentencing Commission, 2005 Sourcebook of Federal Sentencing Statistics, Tables 37, 39, available at http://www.ussc.gov/ANNRPT/2005/SBTOC05.htm.

[151] 2002 Cocaine Report, *supra* note 67, at 39.

[152] U.S. Department of Justice, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Executive Summary (February 4, 1994) ("DOJ Drug Offender Analysis"), available on the Booker Fanfan Resources page at http://www.fd.org.

[153] Miles D. Harar, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes?*, 7 Fed. Sent. Rep. 22, 1994 WL 502677 (July/August 1994).

[154] Peter Reuter & Jonathan Caulkins, *Redefining the Goals of National Drug Policy: Recommendations from a Working Group*, 85 Am. J. Pub. Health 1059, 1062 (1995).

risk of recidivism could be reduced further with drug treatment.[155] In 2004, the Commission reported its own findings that drug trafficking offenders (along with larceny and fraud offenders) are the least likely to recidivate and that drug treatment and educational opportunities are likely to have a high cost/benefit value.[156]

The Commission has been aware since at least the mid-1990s that incarceration prevents little if any drug crime because drug crime is driven by demand, street dealers and couriers are easily replaced, so the crime is simply committed by someone else.[157] While the federal prison population has skyrocketed, drug use rates have increased over the past few years,[158] and teenagers are using dangerous drugs at twice the rate they did in the 1980s.[159] At the same time, the persistent removal of persons from the community for lengthy periods of incarceration weakens family ties and employment prospects, contributes to increased recidivism, and harms families and communities.[160] Studies show that if a small portion of the budget currently dedicated to incarceration were used for drug treatment, intervention in at-risk families, and school completion programs, it would reduce drug consumption by many tons and save billions of taxpayer dollars.[161]

5. Public Opinion

According to the Rossi and Berk study, the public disagrees with the harshness of drug sentences generally and with the harsher treatment of crack cases:

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[155] Hofer & Semisch, *supra* note 50, at *9 n.20, citing Bureau of Prisons, *Recidivism Among Federal Prison Releases in 1987: A Preliminary Report* (March 1994), Bureau of Prisons, *TRIAD Drug Treatment Evaluation Project: Six-Month Interim Report* (July 1998).

[156] *Measuring Recidivism*, *supra* note 32, at 13, 16 & Exh. 11.

[157] U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* 68 (Feb. 1995) (DEA and FBI reported that dealers were immediately replaced), available at http://www.ussc.gov/crack/CHAP4.HTM; *Incarceration and Crime*, *supra* note 149, at 6; Hofer & Semisch, *supra* note 50, at *9 n.20; *Measuring Recidivism, supra* note 32, at 9; Fifteen Year Report at 133-34.

[158] *Incarceration and Crime*, *supra* note 149, at 6.

[159] Opinion editorial by Eric E. Sterling and Julie Stewart, *Undo This Legacy of Len Bias' Death*, Washington Post, July 24, 2006.

[160] *Incarceration and Crime*, *supra* note 149, at 7-8.

[161] *Id.* at 8; Caulkins, Rydell, Schwabe & Chiesa, *Mandatory Minimum Sentences: Throwing Away the Key or the Taxpayers' Money?* at xvii-xviii (RAND 1997); Rydell & Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (RAND 1994); Aos, Phipps, Barnoski & Lieb, *The Comparative Costs and Benefits of Programs to Reduce Crime* (Washington State Institute for Public Policy 2001), http://www.nicic.org/Library/020074; Sentencing Projext, *The Next Big Thing? Methamphetamine in the United States* at 3 (June 2006), available at http://www.sentencingproject.org/pdfs/methamphetamine_report.pdf.

> The strongest sentencing disagreements occur over drug trafficking crimes: The guidelines call for drug trafficking sentences that vary according to the type of drug sold, roles played in the crime and the amount of drugs involved. In contrast, respondents did not make such distinctions nor did they weigh these crime elements the same way as do the guidelines. The result is strong differences in sentencing drug trafficking crimes with the guideline sentences being much harsher. . . . [R]espondents did not treat trafficking in heroin, powder cocaine or crack cocaine very differently from each other. . . . Median sentences for trafficking in crack cocaine, powder cocaine, and heroin all topped out at about 12 years, even for defendants with four prior prison terms. . . . For possession of crack cocaine, powder cocaine, and heroin, average sentences were about a year. For marijuana, the average sentence was essentially probation.[162]

6. Crack Cases

The Commission has declared that it "firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act."[163] The rate of below-guideline sentences in crack cases has more than tripled after *Booker*, but, according to the Commission, courts usually do not explicitly cite the crack/powder disparity as the reason.[164] This, plainly, is because open disagreement has been chilled, as the courts of appeals have blindly and disingenuously swallowed DOJ's baseless contention that Congress decreed that the 100:1 ratio be used not only in applying the mandatory minimum statute but in calculating the guidelines.

While the courts of appeals have accepted DOJ's argument on the surface, they have mapped out the way to correct for the disparity just the same. In *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), the First Circuit held that the district court could not "jettison" the guideline range and "construct a new sentencing range," but encouraged courts to take into account "the nature of the contraband and/or the severity of a projected guideline sentence . . . on a case-by-case basis." Similarly, in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), the Fourth Circuit prohibited district courts from substituting a different ratio, but it could "certainly envision instances in which some of the § 3553(a) factors will warrant a variance from the advisory sentencing range in a crack cocaine

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[162] Rossi & Berk, *supra* note 85.

[163] 2002 Cocaine Report, *supra* note 67, at 91.

[164] Booker Report at 111, 128. *But see United States v. Perry*, 389 F.Supp.2d 278 (D.R.I. 2005); *United States v. Clay*, 2005 WL 1076243 at **3-6 (E.D. Tenn. May 6, 2005); *Simon v. United States*, 361 F.Supp.2d 35 (E.D.N.Y. 2005); *United States v. Harris*, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005); *United States v. Smith*, 359 F. Supp.2d 771 (E.D. Wis. Mar. 3, 2005).

case. However, a sentencing court must identify the *individual* aspects of the *defendant's case* that fit within the factors listed in 18 U.S.C. § 3553(a) and, in reliance on those findings, impose a non-Guidelines sentence that is reasonable." (emphasis in original). *See also id.* at 637 (analysis and data contained in Commission's reports may be considered "insofar as they are *refracted through* an individual defendant's case." (Michael, J., concurring). *See also United States v. Williams*, __F.3d__ 2006 WL 2039993 (11th Cir. July 21, 2006) (same); *United States v. Jointer*, __F.3d__, 2006 WL 2266308 (7th Cir. Aug. 9, 2006) (same).

It is obvious that prohibiting courts from sentencing in disagreement with congressional policy regarding crack or any other matter short of statutory mandatory sentences is just another way of enforcing unconstitutional mandatory guidelines.[165] However, in litigating crack cases, it is wise to avoid any mention of across-the-board policy arguments or alternative ratios. Instead, feel free to draw from issues identified by the Commission in its crack reports, but individualize them to the client and the offense. For example, the sentence overstates the defendant's culpability and/or need for deterrence and/or need for incapacitation in this case because there was no weapon, no serious violence, or no other offense involved; the offense did not involve a minor; the defendant is merely an addict; the quantity, role or other circumstances show the defendant was not a major dealer; or otherwise, in light of all of the purposes of § 3553(a), a different sentence is required.

C. Immigration Offenses

Average sentence length for immigration offenses nearly tripled from 1990 to 2000, as the Commission increased penalties nearly every year for alien smuggling, §2L1.1, and illegally re-entry, §2L1.2.[166] The best evidence that the immigration guidelines produce sentences that are unduly severe is that they are not followed in the vast majority of cases.[167] Judges and prosecutors have avoided their harshness through

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[165] Sentencing Law and Policy, *Seventh Circuit issues another cracked opinion on the crack ratio*, August 9, 2006, http://sentencing.typepad.com/sentencing_law_and_policy/2006/08/seventh_circuit.html; *Kandirakis*, 2006 WL 2147610 at **6-7.

[166] Fifteen Year Report at 62-65.

[167] *See* Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 Ariz. St. L.J. 517 (2006); Frank O. Bowman III, *Only Suckers Pay the Sticker Price: The Effect of "Fast Track" Programs on the Future of the Sentencing Guidelines as a Principled Sentencing System* at 4 (September 23, 2003), available at http://www.ussc.gov/hearings/9_23_03/fbowman.pdf; *Letter to Sentencing Commission from Federal Public and Community Defenders Re: Report on Federal Sentencing Since United States v. Booker* 10-11, January 10, 2006, 18 Fed. Sent. Rep. __ (forthcoming 2006), available now at http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/defenders_advis.html.

"fast track" charge bargaining and departures for many years.[168] Over 80% of immigration cases are prosecuted in districts that have fast track programs in one form or another.[169] Fast track departures represent the highest departure rates by district.[170] Average sentence length in immigration cases has dropped by nearly 20% since 2000,[171] reflecting an increase in fast track departures,[172] and an increase in fast track charge bargains, the number and precise effect of which is known only to DOJ.

1. The Upward Ratchet in Illegal Re-Entry Cases

Before 1991, defendants sentenced under §2L1.2 received a 4-level increase for a prior felony conviction. In 1991, a 16-level increase was added for re-entering or remaining after a conviction for an aggravated felony, defined initially as murder, drug trafficking, firearms trafficking, money laundering, and crimes of violence for which the term of imprisonment was at least five years.[173] This was not required by Congress, and was not supported by data or research. It was suggested by a Commissioner, voted on with little discussion, and passed with no explanation.[174] In 1997, the Commission changed the definition to any aggravated felony as defined in 8 U.S.C. §1101(a)(43), which swept in recent statutory amendments adding rape, sexual abuse of a minor, and

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[168] Fifteen Year Report at 87, 91.

[169] According to documents submitted in the *Medrano-Duran* case, *infra*, fast track programs were authorized through at least September 30, 2005 in the Districts of Arizona, Idaho, Nebraska, New Mexico, North Dakota and Oregon, all four California districts, the Southern District of Florida, the Northern District of Georgia, the Eastern District of New York, the Southern and Western Districts of Texas, and the Western District of Washington. Those districts handled 9,150 of the 11,132 immigration cases terminated in 2002. *See* Federal Justice Statistics Resource Center, available at http://fjsrc.urban.org/noframe/dist/d2002/cat/s2_t2.cfm.

[170] Fifteen Year Report at 112.

[171] U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 14 (2000-2005) (showing steady decrease from 28.8 months in 2000 to 23.2 months in 2005), available at http://www.ussc.gov/annrpts.htm.

[172] Booker Report at 57-58 n.268.

[173] U.S.S.G., App. C, amend. 375.

[174] *United States v. Galvez-Barrios*, 355 F.Supp.2d 958 (E.D. Wis. 2005); Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases*, 8 Fed. Sent. Rep. 275 (Mar/Apr.1996); James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sent. Rep. 264, 268 (Mar./Apr.1996).

any crime of violence for which the term of imprisonment was at least one year.[175] This was not required by Congress.[176]

In 2001, after a decade of sustained criticism of §2L1.2's "disproportionate penalties,"[177] the Commission retained the 16-level increase for any federal, state or local offense punishable by more than one year that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months, (ii) a crime of violence, (iii) a firearms offense, (iv) a child pornography offense, (v) a national security or terrorism offense, (vi) a human trafficking offense, or (vii) an alien smuggling offense, reduced the increase to 12 levels for a felony drug trafficking offense for which the sentence imposed was 13 months or less, and reduced it to 8 levels for any other aggravated felony.[178] This made matters worse because it broadened crimes of violence from those for which the term of imprisonment was at least one year to those punishable by more than one year.

In 2003, the Commission again extended the reach of the 16-level enhancement and complicated the process by defining certain aggravated felonies (child pornography and human trafficking) more broadly than in 8 U.S.C. § 1101(a)(43).[179] It also redefined "crime of violence" to include statutory rape where previously only "forcible sex offenses (including sexual abuse of a minor)" were included, and "clarified" that the enumerated "crimes of violence" were subject to the 16-level enhancement regardless of whether the offense had as an element the use, attempted use, or threatened use of physical force against the person of another.[180] No reason was given. In *United States v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006), this resulted in a tragic and irrational sentence of 57 months for a young man who had a consensual sexual relationship with his fourteen-year-old girlfriend when he was 18 years old, with parental approval, and with whom he had a child who he supported financially until he was arrested at the border six years later. The Tenth Circuit said that the sentence was "greater than can be justified," but defense counsel did not challenge its unreasonableness.

Because of the intense and pervasive criticism of the immigration guidelines, particularly the disproportionate severity of the illegal re-entry guideline, the Commission held a round table and two hearings on the subject in late 2005 and early 2006. By early March 2006, bills had been introduced in the House and the Senate, which, in different ways, would drastically change immigration offenses and penalties.

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[175] U.S.S.G. App. C, amend. 562.

[176] *See* Illegal Immigrant Responsibility Act of 1996, Sec. 321, Pub. L. 104-208, 110 Stat. 3009-627-628.

[177] U.S.S.G. App. C, amend. 632.

[178] U.S.S.G. § 2L1.2 (2001 Guideline Manual).

[179] U.S.S.G. App. C, amend. 658.

[180] *Id.*

Assured by DOJ that raising penalties would not conflict with DOJ's recommendations to Congress, the Commission raised sentences in numerous ways for alien smuggling (§2L1.1), trafficking in immigration documents (§2L1.1), and fraud in obtaining immigration documents (§2L2.2), but did not reduce sentences for illegal re-entry.

2. Fast Track: Unwarranted Disparity

In 1998, Commission researchers presented a paper finding that the government's use of fast track charge bargains and departures created unwarranted disparity in that shorter sentences were unavailable to all similarly situated offenders.[181] They updated their findings in 2002, noting that the courts of appeals had ruled that departure to address the "inequity" was impermissible.[182] The Commission made no official statement, took no action, and continued to report fast track dispositions as if they were defense-initiated downward departures.

In 2003, after the Protect Act was passed, the Commission eventually reported that at least 40% of non-substantial assistance departures in 2001 were initiated by the government, and that most of these were fast-track departures.[183] It concluded: "Defendants sentenced in districts without authorized early disposition programs . . . can be expected to receive longer sentences than similarly-situated defendants in districts with such programs. This type of geographical disparity appears to be at odds with the overall Sentencing Reform Act goal of reducing unwarranted disparity among similarly-situated offenders."[184] In fact, defendants can receive sentences double or more the average because they are among the 20% unlucky enough to be arrested or "found" in a district without a fast track program.

Despite its duty to avoid unwarranted disparities and its stated methodology of revising the guidelines based on data from actual practice, the Commission has not reduced immigration sentences. After *Booker*, several courts in districts without fast track programs have reduced sentences in immigration cases pursuant to *their* duty to avoid unwarranted disparities under 18 U.S.C. § 3553(a)(6).[185]

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[181] Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 Fed. Sent. Rep. 260, 2002 WL 31304861 (Mar./Apr. 2002).

[182] Linda Drazga Maxfield, *Fiscal Year 2000 Update*, 14 Fed. Sent. Rep. 267, 2002 WL 31304862 (Mar./Apr. 2002).

[183] 2003 Downward Departure Report, *supra* note 29, at iv-v.

[184] *Id.* at 66-67.

[185] *E.g.*, *United States v. Santos*, 406 F.Supp.2d 320 (S.D.N.Y. 2005) (and citing unreported cases); *United States v. Medrano-Duran*, 386 F. Supp.2d 943, 946-48 (N.D. Ill. 2005); *United States v. Peralta-Espinoza*, 383 F. Supp.2d 1107, 1108 (E.D. Wis. 2005); *United States v. Ramirez-Ramirez*, 365 F. Supp.2d 728, 731-32 (E.D. Va. 2005); *United States v. Galvez-Barrios*, 355 F.Supp.2d 958, 963 (E.D. Wis. 2005).

DOJ's position is that the absence of a fast track program in the district is an "illegitimate" basis for reducing a sentence. This, according to DOJ, is because Congress approved the disparity created by the Attorney General's designation of some districts for fast track programs and not others, that the disparity is warranted by an explosion of immigration cases in southwest border districts, and that ameliorating that disparity in non-fast track districts somehow damages the government's fast track programs in other districts. All of this is incorrect.

In the Protect Act, Congress directed the Sentencing Commission to promulgate "a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney." *See* Pub. L. 108-21 § 401(m)(2)(B). The Commission did so. *See* USSG 5K3.1. Congress' intent was to "preserv[e] . . . limited departures pursuant to . . . early disposition programs that allow . . . districts, particularly on the southwest border . . . to process very large numbers of cases with relatively limited resources." *See* 149 Cong. Rec. 2405, H242 (2003).

According to documents produced by the government in *United States v. Medrano-Duran*, 386 F. Supp.2d 943 (N.D. Ill. 2005), as of October 29, 2004, the Attorney General had approved fast track programs in districts with large immigration caseloads and districts with miniscule immigration caseloads; using a charge bargain method (in which defendants plead to a charge with a 6, 24 or 30-month maximum) and/or the congressionally-approved section 5K3.1 departure; for immigration cases and/or for drug cases.[186]

As Judge Kennelly found in *Medrano-Duran*, (1) the charge bargain method used in five of the approved districts was not specifically approved by Congress and results in more of a reduction than the congressionally approved departure method, and (2) in five of the approved districts each AUSA handles between .58 and 3.32 immigration cases per year. As Judge Cassell found in *United States v. Perez-Chavez*, 2005 U.S. Dist. Lexis 9252 (D. Utah 2005), the Attorney General has approved fast track programs in districts far from the border with small immigration caseloads, yet denied them to similarly-situated districts like Utah. At the same time, there are several districts with high immigration caseloads but no fast track programs, including the Southern and Northern Districts of New York, the District of Nevada, the Florida districts, and certain divisions of the Southern District of Texas.[187] Further, there is vast disparity in the extent of sentence reductions among approved fast track programs.[188]

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[186] The documents are available on www.fd.org, *The Truth About Fast Track*. They are also available on PACER.

[187] McClellan & Sands, *supra* note 167.

[188] *Id.*

In short, the government's arguments that Congress approved the disparity created by the Attorney General's choices and that those choices reflect and are necessary to law enforcement needs are specious. Moreover, the government's position is contrary to its usual position, accepted by a number of courts, that section 3553(a)(6) requires courts to enforce national norms.

Justice Scalia said that "any system which held it *per se* unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional." *Booker*, 543 U.S. at 311 (Scalia, J., dissenting). Nonetheless, the Fourth, Seventh and Ninth Circuits have done just that in prohibiting consideration of fast track disparity. The Seventh Circuit "reasoned" that since a guideline sentence was not necessarily unreasonable if imposed in a district without a fast track program, it followed that a sentence reduced on the basis of the disparity created by the absence of a fast track program was necessarily unreasonable. *United States v. Galicia-Cardenas*, 443 F.3d 553 (7th Cir. 2006). The Ninth Circuit made the fantastic assertion that when Congress directed the Commission to promulgate a fast track departure, it "did so with knowledge that 18 U.S.C. § 3553(a)(6) was directing sentencing courts to consider the need to avoid unwarranted sentencing disparities," and "[b]y authorizing fast track programs without revising the terms of § 3553(a)(6), Congress was necessarily providing that sentencing disparities that result from these programs are warranted and, as such, do not violate § 3553(a)(6)." *United States v. Marcial-Santiago*, 447 F.3d 715 (9th Cir. 2006). The Fourth Circuit's position is that a variance to correct for the disparity created by the government's fast track choices cannot be tolerated because it would deprive the government of its unilateral power to choose. This power does not depend on congressional authorization or the need to handle a large immigration caseload, as the court of appeals recognized that Congress did not authorize fast track charge bargains and that fast tack dispositions are used in districts with small immigration caseloads, even the Eastern District of North Carolina when the government so chooses. *United States v. Perez-Pena*, 453 F.3d 236 (4th Cir. 2006).

The Sixth Circuit took a more grounded approach in *United States v. Ossa-Gallegos*, 453 F.3d 371 (6th Cir. 2006). The district court had granted a two-level departure to provide for some "equality of justice when sentences vary for people based on where they are sentenced." The defendant, relying on the 1998 study by Commission researchers, *supra*, argued on appeal that the two-level departure did not eliminate the unwarranted disparity. The Sixth Circuit found that the variance was reasonable although the district court "did not entirely eliminate the disparity between Ossa-Gallegos's sentence and the sentences of defendants with similar criminal histories in fast-track jurisdictions," because it did "reduce this disparity," the defendant did not waive his right to appeal like defendants who receive a four-level departure, and Congress "seems to have endorsed at least some degree of disparity."

The issue should be raised and preserved, even in circuits that have rejected it, using studies as in *Ossa-Gallegos*, and documentation of fast track programs as in *Medrano-Duran*.

D. Economic Crimes

The fraud/theft guideline, U.S.S.G. § 2B1.1, can easily produce sentences that are greater than necessary to satisfy sentencing purposes, first, because it "place[s] undue weight on the amount of loss involved in the fraud," which in many cases "is a kind of accident" and thus "a relatively weak indicator of the moral seriousness of the offense or the need for deterrence,"[189] and second, because it imposes cumulative enhancements for many closely related factors.[190] The Commission has not explained why it is appropriate to accord such huge weight to loss or why it promulgated the many overlapping additional adjustments.[191] As noted above, Rossi & Berk's 1995 public opinion survey showed that survey respondents gave substantially smaller additional punishment than the guidelines for increases in dollar amount losses, even before the sharp increases in 2001 and 2003.[192] In *United States v. Adelson*, __ F.Supp.2d __, 2006 WL 2008 727 (S.D.N.Y. July 20, 2006), Judge Rakoff provides an incisive analysis of how the fraud guideline can lead to pointlessly barbaric results, and reduces a life sentence to 42 months based on the purposes of sentencing and individualized factors the guidelines reject.

The initial Commission increased sentences for economic crimes above past practice to provide a "short but definite period of confinement for a larger proportion of these 'white collar' cases" in the belief that this would "ensure proportionate punishment and . . . achieve deterrence."[193] A deterrence researcher advised the Commission that certainty is more important to deterrence than severity.[194] Other research has shown that lengthy terms of incarceration have little deterrent effect on white-collar offenders, presumably the most rational group of offenders.[195]

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[189] *United States v. Emmenegger*, 329 F.Supp.2d 416, 427-28 (S.D.N.Y. 2004). *See also United States v. Adelson*, __ F.Supp.2d __, 2006 WL 2008727 *3 (S.D.N.Y. July 20, 2006).

[190] Constitution Project's Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World* 9-10 (July 11, 2006), available at http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf; *United States v. Lauersen*, 362 F.3d 160, 164-65 (2d Cir. 2004); *Adelson*, 2006 WL 2008727 at **4-5.

[191] *Adelson*, 2006 WL 2008727 at **3, 5.

[192] Rossi & Berk, *supra* note 85, ch. 4, p. 78.

[193] Fifteen Year Report at 56.

[194] Hofer & Allenbaugh, *supra* note 54, at 61 n.192.

[195] *See* Sally S. Simpson, *Corporate Crime, Law, and Social Control* 6, 9, 35 (Cambridge University Press) (2002); David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995).

Early on, however, the Commission began to ratchet up the punishment for economic crimes in response to pressure from DOJ and perceived signals from Congress.[196] In 1989, former Commissioner Michael K. Block and former Deputy Chief Counsel Jeffrey S. Parker criticized the Commission for "gratuitously" increasing punishment for larger fraud cases by as much as 25% in response to the DOJ *ex officio*'s argument that certain statutes were "oblique signals" from Congress when the statutes "said no such thing." Block and Parker noted that the process was "overtly political and inexpert," and that the Commission had abandoned its statutory mandates by failing to rely on its own data, failing to measure the effectiveness or efficiency of guideline sentences, and failing to provide analysis of prison impact.[197]

From 1987 to 1995, the Commission increased the punishment for economic crimes nearly annually, resulting in an "unplanned upward drift."[198] In the Economic Crimes Package of 2001, it lowered sentences for some low-loss offenders but significantly raised sentences for most mid- to high-loss offenders. In 2003, the base offense level was increased from six to seven for defendants convicted of an offense with a statutory maximum of 20 years, *i.e.*, any type of fraud after the Sarbanes-Oxley Act, resulting in a 10% increase for all fraud offenders, and restricting or precluding non-prison alternatives for the 40% of fraud offenders at the lowest level. This followed intense pressure from DOJ and a unilateral amendment of the legislative history by one Senator directing the Commission to determine whether enhanced penalties were warranted not only for the high-end, big-dollar corporate scandals at which Sarbanes-Oxley was directed, but for low-level fraud offenders, after "closely considering" the "penalty gap" between fraud and narcotics cases.[199] However, sentences for low-level drug offenders are overly severe and therefore provided no basis for increasing the punishment for low-level fraud offenders.[200]

Further, § 2B1.1 includes approximately forty specific offense characteristics, many of which replicate or overlap with the loss concept, with one another, and with further upward adjustments under Chapter 3. In *Adelson*, for example, the government argued for six such enhancements totaling 20 points. Judge Rakoff found four of them, totaling 16 points, but the guideline still required a life sentence. Judge Rakoff found that "here, the calculations under the guidelines have so run amok that they are patently

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[196] Fifteen Year Report at 56.

[197] *See* Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-20 (1989).

[198] *See* Frank O. Bowman III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 387 (2004).

[199] *Id.* at 387-435.

[200] *See* Part II(A), *supra*.

absurd on their face."[201] Section 2B1.1 exemplifies what the Commission's Fifteen Year Report calls "factor creep," where "more and more adjustments are added" and "it is increasingly difficult to ensure that the interactions among them, and their cumulative effect, properly track offense seriousness."[202] Citing to Justice Breyer's 1999 speech, *see* Part I(C), *supra*, the Fifteen Year Report notes that "[c]omplex rules with many adjustments may foster a perception of a precise moral calculus, but on closer inspection this precision proves false."[203] These adjustments have been added on a frequent basis in response to "political pressure," but "without a sound policy basis" or a demonstrated empirical need.[204]

E. Firearms Offenses

By 2004, average time served for firearms trafficking and illegal firearms possession had doubled independent of mandatory minimums under § 924(c).[205] In a recent article, Mark Rankin and Rachel May explain that much of this due to the use of cross references to uncharged and acquitted more serious offenses, and provide excellent tips on how to avoid such cross references. *See* Rankin & May, *Traps for the Unwary - Cross References and Guideline Sentencing*, The Champion (September/October 2006).

The firearms amendments the Commission voted in on April 5, 2006 are a recent example of the upward ratchet at work, even in some instances when contrary to congressional intent and DOJ's wishes. The "legislative history" of these amendments can be used to obtain a non-guideline sentence.

"Trafficking" The Commission adopted a "trafficking" enhancement knowing that it applies by its terms to defendants who are not really "traffickers."

The Commission's original proposal would have enhanced the sentence whenever more than one firearm was transferred for any reason with or without consideration.[206] The Defenders, joined by the Practitioners' Advisory Group, proposed a narrower alternative based on Congress' definition of "in the business of" in 18 U.S.C. § 921 and

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[201] *Adelson*, 2006 WL 2008727 at *10.

[202] Fifteen Year Report at 137, citing Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychol. Pub. Pol'y & L. 739, 742 (2001) (Complexity of Guidelines has created a "façade of precision" which "undermines the goals of sentencing.").

[203] Fifteen Year Report at 137.

[204] *Id.* at 138 (citations omitted).

[205] *Id.* at 139.

[206] Federal Register Notice at 47-48 (Jan. 27, 2006), http://www.ussc.gov/FEDREG/Fedreg0106.pdf.

that would preclude double counting with the number of firearms under 2K2.1(b)(1) and the "in connection with" enhancement under 2K2.1(b)(5).[207]

DOJ proposed a definition as the transfer of, or receipt with intent to transfer, more than one firearm with knowledge or reason to believe the transferee's possession or receipt would be unlawful, regardless of whether anything of value was exchanged, and would allow double counting.[208] DOJ said that firearms "traffickers" traffic in a small number of guns, *i.e.*, two, and often have no criminal history, so penalties must be substantially increased in order to "merit" the expenditure of resources to prosecute them.[209]

By a vote of 4-2, the Commission adopted an enhancement, closely tracking DOJ's, of 4 levels if the defendant transferred two or more firearms, or received two or more firearms with intent to transfer them, with knowledge or reason to believe that the transferee's possession or receipt would be unlawful by virtue of a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence, or was under a criminal justice sentence (including probation, parole, supervised release, imprisonment, work release, or escape status), or that the transferee intended to use or dispose of the firearm unlawfully, regardless of whether anything of value was exchanged. Double counting with the number of firearms and "in connection with" enhancements explicitly are allowed.[210]

Concerns were raised by one Commissioner (who voted against the amendment), the Defenders, and the Probation Officers' Advisory Group that this definition would apply to persons who are not really traffickers, such as a straw purchaser who buys two or more firearms for a friend, the rural poor who barter guns for necessary items because they have no money, and prohibited possessors who divest themselves of guns as the law requires. The DOJ witness said that the enhancement "**would not be mandatory**" as to straw purchasers and would "be **left on a case-by-case basis for the sentencing judge to determine.**" Another Commissioner (who voted for the amendment) thought that judges would give "**a break**" to defendants who barter guns in rural areas.[211] If you have a client who is not really a "trafficker," make use of this "legislative history." *Cf. United States v. VanLeer*, 270 F. Supp.2d 1318, 1319, 1326-27 (D. Utah 2003) (departing four

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[207] Defenders' Written Testimony at 11-15 (Mar. 9, 2006), http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf; PAG Written Testimony at 8-9 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/Greg-Smith.PDF.

[208] DOJ Written Testimony at 9 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

[209] *Id.* at 3-4.

[210] Federal Register Notice (May 18, 2006), http://www.ussc.gov/FEDREG/2006finalnot.pdf.

[211] Public Hearing at 52-57, 178-79, 182-84, 203-05, 230-31 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/0315USSC.pdf.

levels under § 5K2.11 (lesser harms) because defendant's conduct -- briefly possessing a gun so that he could dispose of it to obtain money for rent -- did not threaten the harm that the felon in possession statute seeks to prevent -- violent crimes and consequent personal injury or death).

The Commission also seemed to believe that the breadth of its amendment was necessary to prevent urban violence even if it swept in rural offenders.[212] In this regard, note that Congress directed the Commission in the SRA to consider "the community view of the gravity of the offense" and the "public concern generated by the offense,"[213] recognizing that "community norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense."[214] The guidelines make no such provision. Local attitudes and priorities, which differ widely in many respects including as to firearms,[215] may be considered now that the guidelines are not controlling.

Semiautomatic Weapons The Violent Crime Control and Law Enforcement Act of 1994 (the Act), *inter alia*, created a new offense at 18 U.S.C. § 922(v) criminalizing the manufacture, transfer or possession of a "semiautomatic assault weapon" listed in 18 U.S.C. § 921(a)(30), subject to a five-year maximum under 18 U.S.C. § 924(a)(1)(B), and directed the Commission to enhance punishment for a crime of violence or drug trafficking offense involving a "semiautomatic firearm." In response to the congressional directive, the Commission promulgated the upward departure provision in § 5K2.17 for semiautomatic firearms with a magazine capacity of more than ten cartridges possessed in connection with a crime of violence or controlled substance offense.[216] Congress required nothing further, but the Commission amended § 2K2.1 to require the same enhancements for semiautomatic assault weapons as defined in § 921(a)(30) as those described in 26 U.S.C. § 5845 (sawed-off shotguns, machine guns, bombs, silencers) in calculating the guideline range under § 2K2.1(a)(1), (3), (4) and (5) when the firearm was *not* connected with a crime of violence or drug trafficking offense.[217]

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[212] *Id.* at 205-08 (discussing how to write an amendment taking urban and rural concerns into account). The amendment was announced with a statement that it would target urban gun violence.

[213] 28 U.S.C. § 994(c)(4), (5).

[214] S. Rep. No 98-225 at 170.

[215] *See* Vincent L. Broderick, *Local Factors in Sentencing*, 5 Fed. Sent. Rep. 314, 1993 WL 321688 *2 (1993) ("Possession of a firearm by a felon will be viewed markedly differently in Wyoming, where hunting is a way of life, and in the South Bronx, where a felon with a firearm is a threat to the community."). *See also* Michael O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 Iowa L. Rev. 721 (2002); Rossi & Berk, *supra* note 79.

[216] U.S.S.G., App. C., amend. 531.

[217] U.S.S.G., App. C, amend. 522.

The assault weapons ban was repealed by the terms of the Act on September 13, 2004. Congress has taken no action to re-instate it. Nonetheless, on April 5, 2006, the Commission voted to retain the enhancement in § 2K2.1(a)(1), (3) and (4) (but not (5)), to broaden its definition from the specific list in 18 U.S.C. § 921(a)(30) to a "semiautomatic firearm that is capable of accepting . . . more than 15 rounds of ammunition," and to amend the definition in §5K2.17 to require more than 15 rounds. The Defenders provided extensive comments demonstrating that this option was not supported by any data, was contrary to congressional intent, and would include ordinary firearms with legitimate uses and little risk of unlawful violence.[218] DOJ urged the Commission to use the upward departure only and *not* enhanced base offense levels "in light of the fact that possession of such firearms are no longer illegal *per se*."[219] The only reason the Commission gave for retaining and expanding the enhancements was that it had "received information" (from Probation Officers) of "inconsistent application . . . in light of the ban's expiration."[220]

As the Ninth Circuit recently said in holding that possession of a semiautomatic assault weapon was not a "crime of violence:"

> The most plausible inference to be drawn from the evolution of federal law as to assault weapons is that Congress allowed the ban to lapse, having found it unnecessary. Because current federal policy places assault weapons on the same footing as other non-registerable weapons, we see this, on balance, as supporting [the defendant's] position. We find more significant the fact that, when the federal assault-weapon ban ended, Congress didn't require previously-banned semiautomatic weapons to be registered. The fact that semiautomatic weapons are not now, nor have ever been, subject to a blanket registration requirement suggests that mere possession of them does not pose the same risk of physical injury as possession of weapons subject to a blanket federal registration requirement-like silencers and sawed-off shotguns.[221]

The increased offense levels based on the broadened definition in the 2006 amendment make even less sense.

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[218] Defenders Written Testimony at 2-10 (March 9, 2006), http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf.

[219] DOJ Written Testimony at 11 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

[220] Federal Register Notice at 45 (May 18, 2006), http://www.ussc.gov/FEDREG/2006finalnot.pdf.

[221] *United States v. Serna*, 435 F.3d 1046, 1049 (9th Cir. 2006).

Obliterated Serial Numbers The Commission increased the enhancement for a firearm with an obliterated serial number from 2 to 4 levels, and declined to include a *mens rea* requirement. When published for comment, the reason given was "the difficulty in tracing firearms with altered or obliterated serial numbers."[222] The final amendment was published with an additional reason, "the increased market for these types of weapons,"[223] which was never published for comment or raised by any witness in a public document or hearing.

Responding to the reason published, the Defenders provided information from a law enforcement website explaining that the serial number is able to be restored by a simple laboratory procedure in most cases and anecdotal information that the number is recovered more often than not.[224] The Defenders and PAG also urged the Commission to add a *mens rea* requirement based on § 3553(a)(2)(A) (the need to achieve "just punishment" in light of the "seriousness of the offense") and § 3553(a)(6) (the need to "avoid unwarranted disparities" created by treating dissimilar defendants the same).[225] DOJ expressed no direct opinion on a *mens rea* requirement but perhaps unwittingly supported such a requirement by arguing that the 4-level enhancement would "better reflect the culpability of this conduct" because the "intentional obliteration of a serial number can be intended only to make it more difficult" to trace the firearm.[226] The Commission adopted a 4-level increase and declined to add a *mens rea* requirement.

"In Connection With" The Commission defined "in connection with" to mean "the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense [for purposes of the 4-level enhancement] or another offense [for purposes of the cross reference], respectively." The language is taken from *Smith v. United States*, 508 U.S. 223 (1993), where the Supreme Court interpreted the meaning of "in relation to" in § 924(c)(1). The Commission, however, broadened "in connection with" beyond that contemplated in *Smith* to include finding and taking a firearm during a burglary even if the defendant did not use or possess the firearm in any other way during the burglary, and

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[222] Federal Register Notice at 41 (Jan. 27, 2006), http://www.ussc.gov/FEDREG/Fedreg0106.pdf.

[223] Federal Register Notice at 47 (May 18, 2006), http://www.ussc.gov/FEDREG/2006finalnot.pdf.

[224] Defenders' Written Testimony at 16 (Mar. 9, 2006), http://www.ussc.gov/hearings/03_15_06/rhodes-testimony.pdf; Division of Criminal Investigation, Iowa Department of Public Safety, Restoration of Obliterated Serial Numbers, http://www.state.ia.us/government/dps/dci/lab/firearms/serialno.htm.

[225] *Id.* at 17; PAG Written Testimony at 9-10 (Mar. 15, 2006), http://www.ussc.gov/hearings/03_15_06/Greg-Smith.PDF.

[226] DOJ Written Testimony at 10 (March 15, 2006), http://www.ussc.gov/hearings/03_15_06/Richard-Hertling.PDF.

the mere presence of a firearm in close proximity to drugs or drug manufacturing materials or paraphernalia.

The Court made clear in *Smith* that "potential of facilitating" does not include mere coincidence or mere possession or presence of a firearm even during a drug trafficking offense:

> The phrase "in relation to" thus, at a minimum, clarifies that the firearms must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. . . . [T]he "in relation to" language allays explicitly the concern that a person could be punished under § 924(c)(1) for committing a drug trafficking offense while in possession of a firearm even though the firearm's presence is coincidental or entirely unrelated to the crime.

Id. at 238. The Commission's new definition is even broader than § 2D1.1, comment. (n.3), in that it would apply when a firearm was merely present even when clearly improbable that it was connected with the offense.

The Defenders and PAG opposed the amendment, DOJ took no position, but the Commission nonetheless "determined that application of these provisions is warranted in these cases because of the potential that the presence of the firearm has for facilitating another felony offense or another offense."[227]

The *Smith* Court was clearly concerned about proportionality to the seriousness of the offense, both in terms of an increased risk of violence and *mens rea* on the part of the defendant. The Commission's definition bears no relation to the seriousness of the offense where the firearm was not used, possessed, or intended to be used.

F. Sex Crimes

The key to obtaining a less than guideline sentence in sex cases is a strong record showing that this defendant is not a danger to society. Without such a record, the judge has no incentive or cover to do anything but follow the guidelines. If s/he imposes a lower sentence without strong record support, the government will appeal, the sentence is likely to be overturned, and the case will be a DOJ poster child for restricting judicial discretion.

Contrary to popular myth, sex offenders are amenable to treatment. *See* CSOM, Office of Justice, Department of Justice, *Myths and Facts About Sex Offenders* (August 2000), http://www.csom.org/pubs/mythsfacts.html. They are also less likely to re-offend than non-sex offenders. *Id.*; Department of Justice, Bureau of Justice Statistics,

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[227] Federal Register Notice at 47 (May 18, 2006), http://www.ussc.gov/FEDREG/2006finalnot.pdf.

Recidivism of Sex Offenders Released from Prison in 1994 at 2, http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

Many (even most) people convicted of possession of child pornography are not child predators. It would be wise, therefore, to have the client evaluated, even if it seems obvious to you that he is not a predator. *See United States v. Bailey*, 369 F.Supp.2d 1090 (D. Neb. May 12, 2005).

If the defendant does have predatory tendencies or the offense involved conduct of a violent or sexual nature with a child, you may be able to develop a strong record that under the circumstances treatment is more beneficial to society than incarceration. *See NACDL Report: Truth in Sentencing? The Gonzales Cases*, 17 Fed. Sent. Rep. 327 (June 2005).

For ideas on how to avoid cross-references in sex cases, *see* Rankin & May, *Traps for the Unwary - Cross References and Guideline Sentencing*, The Champion (September/October 2006).

G. Career Offender

The career offender guideline purports to implement 28 U.S.C. § 994(h), in which Congress directed the Commission to provide punishment at or near the maximum for defendants convicted of three or more specified federal drug offenses and/or crimes of violence. However, as explained below, the Commission defined the offenses far more broadly than Congress required in the statute.

Before *Booker*, judges often departed from the career offender guideline to ameliorate its irrational harshness. Nonetheless, in October 2003, the Commission limited the extent of such a departure to one level.[228] In November 2004, the Commission reported that the career offender guideline vastly overstates the risk of recidivism and any contribution to deterrence, at least in drug cases. Not surprisingly, in career offender cases after *Booker*, courts have substantially reduced career offender sentences based on the Commission's failure to distinguish between serious and non-serious offenses,[229] the rate of within guideline sentences has "noticeably declined," and average sentence length has decreased.[230]

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[228] U.S.S.G., App. C, amend. 651 (2004).

[229] *E.g.*, *United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006); *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006); *United States v. MacKinnon*, 401 F.3d 8 (1st Cir. 2005); *United States v. Fernandez*, ___ F.Supp.2d ___, 2006 WL 1770268 (E.D.Wis.2006); *United States v. Person*, 377 F. Supp.2d 308 (D. Mass. 2005); *United States v. Hubbard*, 369 F. Supp.2d 146, 148 (D. Mass. 2005); *United States v. Naylor*, 359 F. Supp.2d 521 (W.D. Va. 2005); *United States v. Serrano*, No. 04-CR-414, 2005 U.S. Dist LEXIS 9782, at *22-25 (S.D.N.Y. May 19, 2005); *United States v. Carvajal*, 2005 WL 476125, **5-6 (S.D.N.Y. Feb. 22, 2005).

[230] Booker Report at 137-140.

In 28 U.S.C. § 994(h), Congress directed the Commission to provide punishment at or near the maximum for a defendant convicted of a "felony" that is "described in" 21 U.S.C. §§ 841, 952(a), 955, 959, or 46 U.S.C. App. 1901 *et seq.* (prohibiting manufacture, distribution, dispensation; possession with intent to manufacture, distribute or dispense; and importation of a controlled substance) or is a "crime of violence," after previously being convicted of two or more such felonies. Congress had in mind "repeat violent offenders and repeat drug traffickers."[231]

Instead of using felonies under the specified federal drug statutes, the Commission used the term "controlled substance offense." Initially, this was defined as "an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 959, and similar offenses," but was soon broadened to "an offense under federal or state law, punishable by imprisonment exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense." U.S.S.G. § 4B1.2(b). The inclusion of state offenses seems defensible though not mandated, but the Commission exceeded the statutory directive by including crimes not specified in 28 U.S.C. § 994(h), including export, conspiracy, attempt, possession of a flask or equipment with intent to manufacture under 21 U.S.C. § 843(a)(6), maintaining a place for the purpose of facilitating a controlled substance offense under 21 U.S.C. § 856, and use of a communications facility in committing or facilitating a controlled substance offense under 21 U.S.C. § 843(b). *Id.* & comment. (n.1). Further, the guideline includes any offense that is punishable by as little as a year and a day, while the lowest statutory maximum for the vast majority of the offenses specified by Congress is twenty years. *See* 21 U.S.C. §§ 841(b), 960(b). Only two of the specified offenses are subject to a lower statutory maximum of five years: wrongful distribution or possession of a List I or II chemical, 21 U.S.C. § 841(f), and importation of lesser amounts of marijuana or hashish, 21 U.S.C. §960(b)(4).

At least in drug cases, career offender status is not justified by an increased risk of recidivism or effective deterrence. The recidivism rate for offenders whose career offenders status is based on drug offenses "resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules." Thus, the career offender guideline "makes the criminal history category a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses." Further, criminologists and law enforcement officials have advised the Commission that retail-level drug traffickers are readily replaced as long as demand remains high. Thus, lengthy incapacitation of low-level drug sellers "prevents little, if any, drug selling; the crime is simply committed by someone else." Finally, because career offenders by virtue of drug priors are

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[231] S.Rep. No. 98-225, 98th Cong., 2d Sess. 175 (1983).

disproportionately African American, the career offender guideline has a disparate racial impact that is not justified (regardless of race) by sentencing purposes.[232]

The Commission's definition of "crime of violence" also is problematic in that it commonly reaches offenders who are not the "repeat violent offenders" Congress had in mind. The original career offender guideline defined "crime of violence" as Congress did when it enacted 28 U.S.C. § 994(h), that is, as in 18 U.S.C. § 16, section (b) of which defines a "crime of violence" as "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." In 1989, the definition was amended to track 18 U.S.C. § 924(e), so that the catchall clause now covers any offense punishable by more than one year that "involves conduct that presents a serious potential risk of physical *injury* to another." The courts have interpreted this provision to include offenses that involve no actual violence or actual injury to another. Among the offenses that courts have found to be "violent" under this definition are tampering with a motor vehicle,[233] burglary of a non-dwelling,[234] fleeing and eluding,[235] operating a motor vehicle without the owner's consent,[236] possession of a short-barreled shotgun,[237] oral threatening,[238] car theft,[239] and failing to return to a halfway house.[240] Other offenses that have been found to be crimes of violence under the identical language in 18 U.S.C. § 924(e) include pickpocketing,[241] possession of a sap,[242] failing to stop for a blue light,[243] carrying a concealed weapon,[244] and driving while intoxicated.[245] As a result, many

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[232] Fifteen Year Report at 133-34 (emphasis in original).

[233] *United States v. Bockes*, 447 F.3d 1090 (8th Cir. 2006).

[234] *United States v. Hascall*, 76 F.3d 902, 904-06 (8th Cir. 1996); *United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992).

[235] *United States v. Rosas*, 410 F.3d 332, 334 (7th Cir. 2005); *United States v. Richardson*, 437 F.3d 550 (6th Cir. 2006).

[236] *United States v. Lindquist*, 421 F.3d 751 (8th Cir. 2005).

[237] *United States v. Delaney*, 427 F.3d 1224 (9th Cir. 2005).

[238] *United States v. Leavitt*, 925 F.2d 516 (1st Cir. 1991).

[239] *United States v. Sun Bear*, 307 F.3d 747, 752-53 (8th Cir.2002).

[240] *United States v. Bryant*, 310 F.3d 550, 553 (7th Cir.2002).

[241] *United States v. Mobley*, 40 F3d 688 (4th Cir. 1994).

[242] *United States v. Canon*, 993 F2d 1439 (9th Cir. 1993).

[243] *United States v. James*, 337 F.3d 387 (4th Cir. 2003).

[244] *United States v. Hall*, 77 F3d 398 (11th Cir. 1996).

defendants who have never physically harmed another human being have been classified as violent career offenders. Rather than accurately identifying and punishing violent, predatory offenders, too often the career offender guideline snatches up defendants convicted of nothing more than low-risk crimes of opportunity and property offenses that seem in no way intrinsically violent.

The problem is exacerbated by defining a prior felony conviction as a "prior adult federal or state conviction for an offense punishable by . . . imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2, comment. (n.1). Some states have misdemeanors punishable by up to two years (North Carolina, Pennsylvania), two and a half years (Massachusetts), three years (South Carolina), and even ten years (Maryland). Thus, defendants are regularly classified as career offenders based on misdemeanor convictions that resulted in only the most minimal punishment in state court.[246] This results in punishment that is disproportionate to the seriousness of the offense and unwarranted uniformity. A defendant who receives two simple assault convictions for bar room scuffles and spends not a day in jail is treated no differently under the career offender guideline than a defendant with murder and rape convictions. The Commission need not have chosen a definition so wildly over-inclusive. It could have used the definition of felony used in 18 U.S.C. § 924(e), which excludes convictions designated as misdemeanors by the jurisdiction. *See* 18 U.S.C. § 921(a)(20)(B).

Finally, according to the Rossi & Berk public opinion survey, "there was little support for sentences consistent with most habitual offender legislation. To be sure, longer previous criminal records led to longer sentences, but at substantially smaller increments than under such initiatives as 'three-strikes-and-you're out.'"[247]

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[245] *United States v. Begay*, 377 F. Supp. 2d 1141 (D. N.M. 2005).

[246] *E.g., United States v. Thompson*, 88 Fed.Appx. 480 (3d. Cir. 2004) (misdemeanor conviction for simple assault for which defendant received sentence of probation qualified as career offender predicate); *United States v. Raynor*, 939 F.2d 191 (4th Cir. 1991) (misdemeanor conviction for assault on a law officer punished by unsupervised probation and $25 fine qualified as career offender predicate); *see also NACDL Report: Truth in Sentencing? The Gonzales Cases*, 17 Fed. Sent. Rep. 327, **7-11 (June 2005) (defendant's guideline sentence was increased nine-fold as a result of being classified as a career offender based on two state misdemeanors and one minor felony: (1) assault and battery, a misdemeanor under state law punishable by 0-10 years; (2) "failure to stop for a blue light," a misdemeanor under state law punishable by 90 days to three years; and (3) possession of less than one gram of cocaine base, a felony under state law punishable by 0-5 years, all classified as non-violent under South Carolina law, and all of which the defendant pled guilty to on the same day at the age of 18, for which he received a suspended sentence and served seven months after revocation of probation).

[247] Rossi & Berk, *supra* note 85, Executive Summary.

H. First Offenders

The Commission has found that minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism, which the Guidelines do not take into account.[248] Nonetheless, the Commission prohibits a departure below the applicable range for Criminal History Category I. *See* U.S.S.G. § 4A1.3(b)(2). Further, Congress directed the Commission twenty-two years ago to ensure that the "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[249] The Commission recognizes the need to act on this directive, but has not yet done so.[250]

In 1991, a Commission working group proposed several alternatives to implement the congressional directive, including (1) a two-level reduction for offenders who had zero criminal history points and did not use violence or weapons in the instant offense; or (2) allowing first offenders access to probation or other alternatives to prison.[251] In 2000, another working group also studied alternatives and in 2001, former Commissioner Michael O'Neill proposed a new first offender Criminal History Category or a downward departure for first offenders.[252]

In 2004, the Commission reported that over 49% of federal offenders in 1992 had zero criminal history points; in 2001, that percentage was over 40%.[253] First offenders are more likely to be involved in less dangerous offenses and their offenses involve fewer indicia of culpability, such as no use of violence or weapons, no bodily injury, a minor role or acceptance of responsibility.[254] They are also more likely than offenders with criminal histories to have a high school education, to be employed or to have dependents.[255] Further supporting alternatives to prison for this group is the finding that offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.[256]

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[248] *Salient Factor Score*, *supra* note 32, at 15.

[249] 28 U.S.C. § 994(j).

[250] *First Offender*, *supra* note 32, at 1-2.

[251] *Id.* at 3.

[252] *Id.* at 3 (citing Michael E. O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 Bost. Coll. L. Rev. 291 (2001).

[253] *Id.* at 4.

[254] *Id.* at 9-10.

[255] *Id.* at 6-11.

[256] *Measuring Recidivism*, *supra* note 32, at 13 & Exhibit 12.

However "first offender" status is defined, the rate of recidivism (including reconviction, rearrest or revocation) for first offenders is 11.7%, which is significantly lower than the rate of 22.6% for offenders with one criminal history point, or that of 36.5% for offenders with two or more criminal history points.[257] The rate of reconviction alone is similarly much lower: offenders with zero criminal history points have a reconviction rate of 3.5%, those with one point have a reconviction rate of 5.5%, those with two or more points have a reconviction rate of 10.3%.

After *Booker*, the rate of non-government-sponsored below-range sentences increased for first offenders, defined as those with no contact with the criminal justice system whatsoever, including no arrests or other non-countable events.[258]

I. Criminal History

The guidelines' criminal history rules were not based on empirical evidence, because of "pressing congressional deadlines."[259] The Commission said it would incorporate empirical research and data as it became available, but still has not done so.[260]

After *Booker*, as before, criminal history has been one of the most frequent bases for sentences below the guideline range.[261] The Commission has long recognized that the criminal history rules treat unlike offenders alike, for example, by adding three points to criminal history score whether the sentence imposed was 14 months or 14 years, and failing to distinguish between sentences of the same length imposed in parole and non-parole systems though the defendants serve two very different terms of imprisonment.[262]

Studies published by the Commission in 2004 and 2005 demonstrate that the guidelines exclude considerations that predict a reduced risk of recidivism or an increased likelihood of rehabilitation, and include factors that increase the criminal history score but have no predictive value or overstate the risk of recidivism.

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[257] *First Offender, supra* note 32, at 13-14.

[258] Booker Report at 132 & n.348.

[259] *Measuring Recidivism, supra* note 32, at 1-2; *Salient Factor Score, supra* note 32, at 2-4.

[260] *Measuring Recidivism, supra* note 32, at 2.

[261] Booker Report at 79.

[262] Simplification Draft Paper, Chapter Four, Part V, http://www.ussc.gov/SIMPLE/crimhist.htm.

- Age: Age is a powerful component of recidivism prediction, which the Guidelines do not take into account.[263] "Recidivism rates decline relatively consistently as age increases," from 35.5% under age 21, to 9.5% over age 50.[264]
- Employment: Stable employment in the year prior to arrest is associated with a lower risk of recidivism.[265]
- Education: Recidivism rates decrease with increasing educational level (no high school, high school, some college, college degree).[266]
- Family: Recidivism rates are lower for defendants who are or were ever married, even if divorced.[267]
- Gender: Women recidivate at a lower rate than men.[268]
- Abstinence from drug use: Recidivism rates are lower for those without illicit drug use in the year prior to the offense.[269]
- Rehabilitation and Education: Drug treatment programs and educational opportunities would have a high cost-benefit value.[270]
- Non-Violent Offenders: Offenders sentenced under the fraud, larceny and drug guidelines are the least likely to recidivate.[271]
- Uncounted crimes of violence: The predictive power of U.S.S.G. § 4A1.1(f) is statistically insignificant.[272]
- Minor offenses: Inclusion of non-moving traffic violations in the criminal history score may adversely affect minorities "without clearly advancing a purpose of sentencing" (regardless of the defendant's race) and "there are many other" such possibilities.[273] Many courts and commentators have recognized, and many studies have shown, that African Americans are stopped by the police and charged only with traffic offenses in disproportionate numbers, often called "driving while black."[274]

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[263] *Salient Factor Score, supra* note 32, at 8, 13-15.

[264] *Measuring Recidivism, supra* note 32, at 12 & Exhibit 9.

[265] *Id.* at 12 & Exhibit 10.

[266] *Id.*

[267] *Id.*

[268] *Id.* at 11 & Exhibit 9.

[269] *Id.* at 13 & Exhibit 10.

[270] *Id.* at 15-16.

[271] *Measuring Recidivism, supra* note 32, at 13 & Exhibit 11.

[272] *Salient Factor Score, supra* note 32, at 7, 11, 15.

[273] Fifteen Year Report at 134.

- Increased Recidivism with Straight Prison Offenders are most likely to recidivate when their sentence is straight prison, as opposed to probation or split sentences.[275]

J. Unnecessary Use of Imprisonment

After *Booker*, courts need not impose imprisonment as recommended by U.S.S.G. § 5C1.1 but may use a non-prison alternative that better satisfies the purposes of punishment, including the need for treatment, medical care or rehabilitation in the most effective manner.[276] "Without such options, the current sentence regime fails to accomplish its retributive, deterrent, and rehabilitative goals." *See* Nora Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 Stan. L. Rev. 339 (2005).

The need to allow for more options and flexibility at lower offense and criminal history levels was manifest in the first years of the guidelines. In 1989 a Commission project was authorized to address the need for more options and flexibility at lower offense and criminal history levels. The result was a 1990 report from the Commission's Alternatives to Imprisonment Project, *The Federal Offender: A Program of Intermediate Punishments*, also known as the "Corrothers White Paper." The report gathered data from the federal system, various state programs, and surveyed the judiciary. Cost savings, fairness, effectiveness and efficient utilization of prison space were all important considerations.

The report recommended a number of sentencing alternatives, most of which were already available in the context of supervised release. It recommended expanding the availability of such sentences to a greater number of offense levels (in effect, increasing Zone B and Zone C sentences by five offense levels through Criminal History Category III). The programs recommended as intermediate punishments included:

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[274] *E.g., Bingham v. City of Manhattan Beach*, 341 F.3d 939, 954 (9th Cir. 2003); *Washington v. Lambert*, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996); *Smith v. City of Gretna Police Dept.*, 175 F. Supp.2d 870, 874 (E.D. La. 2001); *Martinez v. Village of Mount Prospect*, 92 F. Supp.2d 780, 782 (N.D. Ill. 2000); *United States v. Leviner*, 31 F. Supp.2d 23, 33 (D. Mass. 1998); *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-52 (1998); Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & Pl'y 291, 296 (1997).

[275] *Measuring Recidivism, supra* note 32, at 13 & Exhibit 12.

[276] *United States v. Anderson*, 365 F.Supp.2d 67 (D. Me. 2005); *United States v. Greer*, 375 F.Supp.2d 790 (E.D. Wis. 2005); *United States v. Cherry*, 366 F.Supp.2d 372 (E.D. Va. 2005); *United States v. Myers*, 353 F.Supp.2d 1026 (S.D. Iowa 2005); *United States v. Ranum*, 353 F.Supp.2d 984 (E.D. Wis. 2005).

- Intermittent Confinement
- Community Confinement
- Residential Incarceration
- Home Detention
- Intensive Supervision
- Public Service Work
- Shock Incarceration (boot camps).

The only amendments the Commission has made in this area were to include a policy statement supporting shock incarceration programs (§ 5G1.2) in 1991, which BOP eliminated in 2005. In 1992, Zone A was expanded by two additional offense levels in Criminal History Category I. Otherwise, the Commission has not implemented the recommendations of the Corrothers White Paper.

In 1994, the General Accounting Office recommended intermediate sanctions for punishing low-risk offenders at a lower cost to the taxpayers.[277] Almost half of all district court judges surveyed in 2002 urged greater availability of non-prison sentences for drug-trafficking offenders, and a slightly smaller number for theft, larceny, embezzlement, and fraud offenders, in order to meet the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).[278]

K. Tips for Reconstructing the "Legislative History" of a Guideline

As in the preceding examples, a little digging will often provide arguments for why the guideline at issue in your case should not be followed (because it was adopted or increased without considering the purposes of sentencing, without study or explanation, contrary to the information before the Commission, and/or contrary to or without a statutory directive), and affirmative reasons for a sentence below the guideline range. These arguments are also necessary in any petition for certiorari challenging presumptive guidelines in their new guise.

- A good place to start is Hutchison et al., Federal Sentencing Law and Practice (West), which is updated annually and is available on Westlaw in the fslp database
- Historical Note at the end of each guideline listing amendments
- Appendix C of the Manual setting out the amendments and reasons if any
- Federal Register Notices published before and after amendment, available at http://www.ussc.gov/NOTICE.HTM

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[277] United States General Accounting Office, *Sentencing: Intermediate Sanctions in the Federal Justice System* (1994).

[278] U.S. Sentencing Commission, *Survey of Article III Judges on the Federal Sentencing Guidelines* ES-5-6 (2003), http://www.ussc.gov/judsurv/execsum.pdf; Fifteen Year Report at 44-45.

- Written and oral testimony and comments of the Federal Public and Community Defenders, the Practitioners Advisory Group, the National Association of Criminal Defense Lawyers, the Probation Officers Advisory Group, and DOJ, available at http://www.ussc.gov/HEARINGS.HTM, http://www.fd.org (go to Publications & Materials, then to Sentencing), http://www.usscpag.com/index.asp, http://www.nacdl.org/public.nsf/freeform/Rules&Reg?OpenDocument, http://www.ussc.gov/POAG/minutes.html
- Any congressional directive cited in the Commission's reason for amendment (Always check the legislation itself. You may find that Congress only told the Commission to study whether penalties should be increased, or amended a criminal statute with no directive to the Commission, or told the Commission to increase penalties in a limited way that the Commission exceeded. *See, e.g., United States v. Butler*, 207 F.3d 839 (6th Cir. 2000) (U.S.S.G. § 3B1.4 authorizing enhancement for using or attempting to use a minor in the offense regardless of defendant's age was contrary to statute directing that the defendant be at least twenty-one).)
- Commission Publications, available at http://www.ussc.gov
- The "public comment file,"[279] available at the Commission for on-site inspection, or may be located and copied upon request if not too voluminous or complex.

III. Post-*Booker* Sentencing Violates Basic Principles of Statutory Construction.

Congressional intent as expressed in § 3553(b) is no longer an option. After *Booker*, many courts continue to follow congressional intent as expressed in § 3553(b). They do this in one of three ways: explicitly,[280] by assuming that the guidelines achieve what Congress had in mind when it sought to avoid unwarranted disparity,[281] or by asserting that the guidelines incorporate § 3553(a).[282]

The whole exercise of the *Booker* remedial opinion was to determine congressional intent had Congress known that judicial factfinding was unconstitutional under § 3553(b). Determining that Congress would have preferred judicial factfinding under § 3553(a) over jury factfinding under § 3553(b), the Court excised § 3553(b). As the Court explained, "that mandatory system is no longer an open choice."[283] Thus, the courts may not look to congressional intent under § 3553(b).

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[279] U.S. Sentencing Commission, Rules of Practice and Procedure, Rule 5.1, available at http://www.ussc.gov/general/rules11_01.pdf.

[280] *See* note 5, *supra*.

[281] *See, e.g., United States v. Mykitiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

[282] *See, e.g., United States v. Johnson*, 445 F.3d 339 (4th Cir. 2006).

[283] *Booker*, 543 U.S. at 263.

The short trip back to § 3553(b) began with the assertion that the *Booker* Court did not say how much weight to give the guidelines, so the lower courts must make that determination.[284] What weight to accord the guidelines, however, was never an open question. By excising § 3553(b), the Court made § 3553(a) the governing law in the district court, which "makes the guidelines effectively advisory."[285] Put another way, the "advisory" weight of the guidelines is a function of a statutory structure that "sets forth numerous factors that govern sentencing," of which the guidelines are but one.[286] As the Sentencing Commission has explained:

> Sentencing guidelines systems . . . range along a continuum from "voluntary" or "advisory," to "presumptive," to "mandatory." The differences among them are marked by the standards governing when a judge may depart from the recommended guideline range, and the extent of appellate review of those departures. The original federal legislation called for advisory guidelines with limited appellate review. During Senate debates in 1978 however a standard was added requiring that judges sentence within the prescribed guideline range unless "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the guidelines and that should result in a different sentence." This was intended to ensure that the guidelines were treated as "presumptive" rather than "voluntary."[287]

The original version of the Sentencing Reform Act (SRA) would have made the guidelines "advisory" in language much like § 3553(a). Section 3553(b) was added to make the guidelines "presumptive" rather than "advisory."[288] Presumptive guidelines are no longer an option under the plain language of § 3553(a) or the Sixth Amendment.

Instead, courts must follow the plain language of 3553(a), and may not render any part of it inoperative, superfluous or insignificant. The courts must

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[284] *E.g.*, 2/10/05 Commission Testimony, *supra* note 9; *Wilson*, 350 F.Supp.2d at 912.

[285] *Booker*, 543 U.S. at 245.

[286] *Id.* at 261.

[287] Fifteen Year Report at 7.

[288] *See Booker*, 543 US at 293 & n.12 (Stevens, J., dissenting in part); Stith & Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 238, 245-46 (1993); 124 Cong. Rec. 209, 382-83 (1978); S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983).

follow the plain language of the statute the Supreme Court left standing: § 3553(a).[289] When the language of a statute is plain, courts may not look to statutory policies or legislative history to construe the statute in a manner that is not clearly warranted by the text.[290]

By the statute's plain terms, judges must "impose" a sentence that is sufficient but not greater than necessary to satisfy the statutory purposes of sentencing, after "considering" a list of factors pertinent to the case, of which the guidelines are one.[291] Not only does the statute say nothing about giving special weight to the guidelines, it makes the guidelines subordinate to the overarching mandate to impose a sentence minimally sufficient to satisfy the purposes of sentencing.[292] This "parsimony principle" dates back to the 1800s, influenced the Founding Fathers in their views about punishment,[293] is implicit or explicit in the guideline systems of most states[294] and the Model Penal Code,[295] and is clearly stated in section 3553(a), which now governs sentencing. Its rationale is that severe penalties are costly to the public, usually harmful to offenders, and have uncertain and limited deterrent value, so the preference is for the least punishment necessary for the public welfare.[296] The guideline range is subordinate

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[289] *See United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Zedner v. United States*, 126 S. Ct. 1976, 1990-91 (2006) (Scalia, J. concurring).

[290] *Crandon v. United States*, 494 U.S. 152, 160 (1997).

[291] *Booker*, 543 U.S. at 259-60.

[292] *United States v. Foreman*, 436 F.3d 638, 643-44 & n.1 (6th Cir. 2006) (district court must follow the "statutory mandate to 'impose a sentence sufficient, but not greater than necessary' to comply with the purposes of sentencing in section 3553(a)(2)"); *United States v. Cawthorn*, 419 F.3d 793, 802 (8th Cir. 2005) ("district court's duty" is to "impose a sentence sufficient but not greater than necessary"); *United States v. Neufeld*, 2005 WL 3055204 *9 (11th Cir. Nov. 16, 2005) (a "more-than-adequate sentence would conflict with § 3553(a)'s injunction against greater-than-necessary sentences"); *United States v. Soto*, 2005 WL 281178 (3d Cir. Oct. 27, 2005) (the sentence must be "adequate and appropriate, not greater than necessary"); *United States v. Acosta-Luna*, 2005 WL 1415565 (10th Cir. June 17, 2005) (the "provisions of 18 U.S.C. § 3553(a), unconstrained by mandatory application of the Guidelines, are now preeminent in sentencing").

[293] Garry Wills, Inventing America 94 (1979); David McCullough, John Adams 66-67 (2001); Jeremy Bentham, The Rationale of Punishment 23 (1830) ("All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.").

[294] Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 68 (2005).

[295] Model Penal Code: Sentencing § 1.02(2)(a)(iii) (Preliminary Draft No. 3 2004).

[296] Frase, *supra* note 294, at 68; Norval Morris, The Future of Imprisonment 59-62 (1974).

to it: The sentence that is minimally sufficient to achieve sentencing purposes must be "imposed," while the guideline range must be "considered."

Under basic canons of statutory construction, every part of a statute has meaning and no provision should be construed as inoperative, superfluous, or insignificant.[297] When courts presume that the guidelines incorporate the requirements of § 3553(a), they render the rest of the statute inoperative and superfluous. (They also fail to appreciate how frequently the guidelines fail to reflect § 3553(a). *See* Parts I and II, *supra*.). Likewise, when courts equate the guidelines with the avoidance of unwarranted disparity under § 3553(a)(6), they render the rest of the statute inoperative. (They also misconstrue congressional intent, and Justice Breyer's intent, with respect to uniformity. *See* Part I(D), *supra*.)

Appeals courts must apply the same standard of review to all sentences. After *Booker*, the pre-2003 text of section 3742(e)(3), which "told appellate courts to determine whether the sentence 'is unreasonable' with regard to § 3553(a)," applies "across the board" and "irrespective of whether the trial judge sentences within or outside the Guidelines range in the exercise of his discretionary power under § 3553(a)."[298] Use of a rebuttable presumption of reasonableness for sentences within the guideline range violates this aspect of the Court's interpretation of the sentencing law.

Some circuits rubber-stamp sentences within or above the guideline range,[299] while reversing below-guideline sentences with what amounts to *de novo* review.[300] These circuits violate the Court's express rejection of "such 'one-way lever[s]'" as "[in]compatible with Congress' intent . . . of promoting uniformity in sentencing."[301] As the Second Circuit has put it: "Obviously, the discretion that *Booker* accords sentencing judges to impose non-Guidelines sentences cannot be an escalator that only goes up."[302] As Judge Heaney of the Eighth Circuit has said: "Affirming upward variances at a rate of 92.3% while affirming downward variances at a rate of 15.8% could hardly be viewed as uniform treatment, and seems contrary to 18 U.S.C. § 3553(a)(6)'s concern with eliminating unwarranted sentence disparity. . . . It is difficult to accept that § 3553(a)(6)

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[297] *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Jones v. United States*, 529 U.S. 848, 857 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Collautti v. Franklin*, 439 U.S. 379, 392 (1979).

[298] *Booker*, 543 U.S. at 260, 261, 263.

[299] *E.g., United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Saldana*, 427 F.3d 298 (5th Cir. 2005); *United States v. Smith*, 440 F.3d 704 (5th Cir. 2006); *United States v. Reinhart*, 442 F.3d 857 (5th Cir. 2006).

[300] *E.g., United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006).

[301] *Booker*, 543 U.S. at 266 (internal citations omitted).

[302] *United States v. Johnson*, __ F.3d __, 2006 WL 2167171 *4 (2d Cir. Aug. 2, 2006).

is satisfied where a circuit treats sentencing appeals in a consistently disparate manner."[303] This unwarranted disparity should be demonstrated with statistics in petitions for certiorari. Professor Berman's blog periodically reports these statistics, but he acknowledges that they are not complete. A review of circuit caselaw is therefore preferable.

Practice Tip. All of the appellate courts have said that the guideline range must be calculated first. This is not objectionable as long as it does not amount to a presumption that the defendant must overcome. As the Sixth Circuit said, once the guideline range is calculated, "the district court throws this ingredient into the section 3553(a) mix," considering, as *Booker* requires, the minimally sufficient mandate and other factors relevant to the case.[304]

As a matter of advocacy in sentencing memoranda and argument, do not calculate the guideline range first. Start with the sentence requested, then justify it with the statutory purposes and factors. It will often make sense to discuss the factors in order of appearance in the statute. Begin with those most favorable, which usually will be the mitigating history and characteristics of the defendant, then a balanced presentation of the offense, including mitigating circumstances. End with an explanation of why the sentence you have requested is sufficient but not greater than necessary to satisfy the purposes of sentencing in light of the relevant factors in the case, including the guidelines.

IV. Post-*Booker* Sentencing Violates the Constitution.

A. Sixth Amendment Right to Jury Trial

In *Blakely* and *Booker*, the Supreme Court explained that the right to jury trial is no procedural formality, but a fundamental reservation of power in the people in our constitutional structure, intended by the Framers to stand between the individual and the power of government.[305] In order to preserve Sixth Amendment substance, the Court held that the right to jury trial attaches to all facts essential to punishment, which include facts under mandatory sentencing guidelines.

As explained in Part III, though the Supreme Court called the pre-*Booker* guidelines "mandatory," they were not entirely mandatory but "presumptive," because § 3553(b) required a sentence within the guideline range absent a circumstance of a kind or degree not taken into consideration by the Commission in formulating guidelines. This made the guidelines "presumptive" rather than "advisory" as they had originally been conceived. The system in *Blakely*, too, was "presumptive," as it permitted the court to

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[303] *United States v. Meyer*, 452 F.3d 998, 1000 n.3 (8th Cir. 2006).

[304] *United States v. McBride*, 434 F.3d 470, 476 (6th Cir. 2006).

[305] *Booker*, 543 U.S. at 237; *Blakely*, 542 U.S. at 305-07.

impose a sentence outside the standard range for the offense of conviction based on "substantial and compelling reasons."[306]

The *Booker* merits majority held that judicial factfinding under such a system violated the Sixth Amendment. Justice Stevens wrote:

> The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself. . . . At first glance, one might believe that the ability of a district judge to depart from the Guidelines means that she is bound only by the statutory maximum. . . . Importantly, however, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range. It was for this reason that we rejected a similar argument in *Blakely*, holding that although the Washington statute allowed the judge to impose a sentence outside the sentencing range for "'substantial and compelling reasons,'" that exception was not available for Blakely himself.[307]

Some courts of appeals attempt to distinguish the post-*Booker* presumption of reasonableness from the system held unconstitutional in *Booker* by insisting that it does not mean a sentence outside the guideline range is presumptively unreasonable.[308] The ratio of appellate reversals of outside-guideline sentences (hundreds) to reversals of within-guideline sentences (one) belies this contention. In fact, to "treat the Guidelines as presumptive is to concede the converse, *i.e.*, that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified factors . . . making the Guidelines, in effect, mandatory."[309] Further, the circuits justify the presumption of reasonableness with the assertion that the Sentencing Commission took into account all of the § 3553(a) purposes and factors in formulating the guidelines. This makes the guidelines even more mandatory than they were before *Booker*.

When a court of appeals says the guidelines are presumptive, but provides no meaningful review of above-guideline sentences, does this mean that judges in that circuit really are bound only by the statutory maximum despite the presumption? The answer is no and it is found in *Blakely*. These circuits start with a presumption in favor

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[306] *Blakely*, 542 U.S. at 299.

[307] *Booker*, 543 U.S. at 234, citing *Blakely*, 542 U.S. at 299.

[308] *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006).

[309] *United States v. Myers*, 353 F.Supp.2d 1026 (S.D. Iowa 2005).

of the guidelines and require *some* finding of fact for a sentence outside the guidelines other than the elements of the offense of conviction.[310] In *Blakely*, the Court said:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.
>
> Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.[311]

B. Procedural Accuracy and Fairness

Though the Sentencing Commission is "not a court, and does not exercise judicial power," *Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989), it promulgated a "policy statement" regarding minimally sufficient constitutional protections. U.S.S.G. § 6A1.3 states that the Commission "believes" that a preponderance of the evidence standard satisfies the Due Process Clause, and tells courts that they are free to consider "[a]ny information . . . without regard to its admissibility under the rules of evidence," including hearsay, "so long as it has sufficient indicia of reliability to ensure its probable accuracy." The Commission's recommended procedures have had disastrous results for fairness and accuracy,[312] as five Supreme Court justices finally recognized in *Blakely* and *Booker*.[313]

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[310] *E.g., United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005) ("little explanation is required" for within-guideline sentence, but judge must "carefully articulate the reasons she concludes that [a non-guideline sentence] is appropriate for that defendant"); *United States v. Hardin*, 437 F.3d 463 (5th Cir. 2006) (reasons for sentence outside guidelines "should be fact specific and include, for example, aggravating or mitigating circumstances relating to personal characteristics of the defendant"); *United States v. Armendariz*, 451 F.3d 352 (5th Cir. 2006) (court may not "deviate[] from the advisory Guidelines range without articulating valid, fact-specific reasons for doing so.").

[311] *Blakely*, 542 U.S. at 305 & n.8 (emphasis in original).

[312] *See, e.g.*, *Kandirakis*, 2006 WL 2147610 at *13; Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission (July 19, 2006), Memorandum at 1-6, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/ defender _letter_to_ussc_71906.pdf; American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1467-69, 1500-01 (2001); Julie O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. Rev. 1342 at 1351, 1393-94 (1997).

After *Booker*, most courts of appeals have held that the district courts may use the Commission's recommended procedures, but have stopped short of saying they must. The Eighth Circuit, however, has held that it is error for a court to accord more protection than U.S.S.G. § 6A1.3 "requires," unless the sentencing enhancement is a "tail which wags the dog of the substantive offense." *See United States v. Okai*, __F.3d__, 2006 WL 2011338 **2-3 (8th Cir. July 20, 2006). This is wrong on several levels. First, even assuming that the Constitution does not require more protection than the Commission recommends, the guidelines are supposedly advisory. Second, for the reasons below, it seems that the Constitution does require more protection than the Commission recommends, particularly in circuits like the Eighth where sentencing courts are directed to treat the guidelines as "presumptively reasonable advice." *Id.* at *3. Third, this approach may violate separation of powers in that it essentially attributes Article III power to the Sentencing Commission. *Mistretta*, 488 U.S. at 408.

1. Fifth Amendment Due Process Right to Proof Beyond a Reasonable Doubt

The *Booker* Court did not address what standard of proof the Fifth Amendment requires for sentence enhancing facts, in either the advisory guideline system the remedial opinion required, or in the presumptive guideline system that has re-arisen from its unconstitutional ashes.

In 1970, the Supreme Court held in *In re Winship* that the Due Process Clause requires proof beyond a reasonable doubt of facts that could result in loss of liberty in a juvenile delinquency proceeding.[314] The Court explained: "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[315] As Justice Harlan elaborated in concurrence, the function of a standard of proof as embodied in the Due Process Clause is to "instruct the factfinder

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[313] *See Blakely*, 542 U.S. at 311-12 ("Any evaluation of *Apprendi*'s 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment [citing to 21 U.S.C. § 841] based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong."); *Booker*, 543 U.S. at 304 ("*judges* determine 'real conduct' on the basis of bureaucratically-prepared, hearsay-riddled presentence reports") (Scalia, J., dissenting in part); *id.* at 319 n. 6 (the Court has corrected the Commission's "mistaken belief" that a preponderance of the evidence satisfies due process) (Thomas, J. dissenting in part).

[314] 397 U.S. 358, 368 (1970).

[315] *Id.* at 363.

concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[316] In a civil suit for money damages, the preponderance standard is acceptable because "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor."[317] But, the Court said, "[w]here one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden * * * of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt."[318] *Winship* involved factfinding by a judge and it did not literally result in "conviction" of a "crime." The Court held that those distinctions made no difference; the potential loss of liberty required proof beyond a reasonable doubt.[319]

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court made clear that the facts to which the beyond a reasonable doubt standard applied were not just those that go to guilt or innocence but those that increase punishment. Maine's homicide law punished an intentional or criminally reckless killing as murder by life imprisonment, unless the defendant proved by a preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it was punished as manslaughter by a fine or imprisonment up to 20 years.[320] The Court held that this burden-shifting scheme violated Due Process by relieving the state of the burden of proving facts supporting a life sentence beyond a reasonable doubt and permitting a defendant to be sentenced to life when the evidence indicated it was as likely as not that he deserved a significantly lesser sentence.[321] The Court explained:

> [T]he criminal law of Maine . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less blameworthy, they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to

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[316] *Id.* at 370.

[317] *Id.* at 371-72.

[318] *Id.* at 363-64; *id.* at 370, 371-72 (Harlan, J, concurring). *See also Addington v. Texas*, 441 U.S. 418, 423 (1979) ("standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision," holding that clear and convincing standard is required for civil commitment).

[319] *Winship*, 397 U.S. at 365-66.

[320] *Mullaney*, 421 U.S. at 691-92.

[321] *Id.* at 703-04.

> establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.
>
> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.
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> Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. . . . *Winship* is concerned with substance rather than this kind of formalism.[322]

Eleven years later, in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court adopted a formalistic approach, holding that legislatures are free to designate particular facts as either elements or sentencing factors, with Fifth and Sixth Amendment protections attaching to the former but not the latter, absent a legislative purpose to evade constitutional requirements, which may be evidenced by a sentencing enhancement that is a "tail which wags the dog of the substantive offense." For the next thirteen years, *McMillan* provided cover for mandatory sentencing laws and presumptive sentencing guidelines bereft of constitutional procedural protections.

In *Apprendi v. New Jersey*, however, the Court reaffirmed *Winship* and *Mullaney*: "Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.' This was a primary lesson of *Mullaney* . . . ."[323] In *Blakely*, and then *Booker*, the Court firmly rejected *McMillan*'s proposition that how a legislature labels a fact can determine whether constitutional rights apply.[324]

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[322] *Id.* at 697-99 (internal citations and quotation marks omitted).

[323] 530 U.S. 466, 484 (1999) (citation omitted). *See also Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

[324] *Blakely*, 542 U.S. at 301-02 & n.5; *Booker*, 543 U.S. at 244.

Further, the *Apprendi* Court made clear that the Fifth Amendment right to due process of law (which is concerned with accuracy and fairness) is distinct from the Sixth Amendment right to jury trial (which is concerned with reserving control in the people against government power).[325] This is also clear from *Winship*, which held that *judges* must use a beyond a reasonable doubt standard when loss of liberty is at stake. Thus, *Booker*'s resolution of the Sixth Amendment issue did not entail a resolution of what standard of proof a *judge* must use in order to comply with the Fifth Amendment.[326]

Justice Thomas, however, stated in his dissent from the remedial decision in *Booker* that the Fifth Amendment requires judges to find enhancing facts by proof beyond a reasonable doubt:

> The commentary to § 6A1.3 states that '[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.' The Court's holding today corrects this mistaken belief. The Fifth Amendment requires proof beyond a reasonable doubt, not a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant.

Booker, 543 U.S. at 319 n.6.

Thus, the judicial use of a preponderance standard in the old presumptive guideline system always did violate the Due Process Clause, and continues to do so after *Booker* at least in those courts that treat the guidelines as presumptive.[327] This conclusion is bolstered by the Supreme Court's burden-shifting cases, which hold that the burden of rebutting a presumption that supports a harsher penalty may not be shifted to the defendant without proof beyond a reasonable doubt of the operative facts supporting the presumption. *See Ulster County v. Allen*, 442 U.S. 140, 157 (1979); *Mullaney*, 421 U.S. at 704; Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 Fed. Sent. R. 170 (Feb. 2006).

Even in courts that treat the guidelines as advisory, calculation of the guideline range is the starting point, must be considered, and therefore must be calculated accurately. The courts certainly have no discretion, *via* § 3553(a), to calculate the

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[325] *Apprendi*. 530 U.S. at 476-77.

[326] *Kandirakis*, 2006 WL 2147610 at **32-33; *United States v. Grier*, 449 F.3d 558, 578-82 (3d Cir. 2006) (Sloviter, J., dissenting), *vacated for rehearing en banc*, 453 F.3d 554 (3d Cir. 2006).

[327] *Kandirakis*, 2006 WL 2147610 at **24-26, 32-36, 38 n.78.

guideline range *in*accurately. Because the guidelines still impact sentence length even when treated as truly advisory, the Ninth Circuit has reaffirmed its pre-*Booker* caselaw holding that the Due Process Clause requires a clear and convincing standard of proof for facts that have a disproportionate effect on the sentence relative to the conviction: "The continuing obligation of the district courts to calculate accurately the appropriate Guidelines sentence triggers the very same due process concerns which led to the 'disproportionate impact' rule in the first place. . . . As the concern with accuracy remains critical, so does the concern that enhancements having a drastic impact be determined with particular accuracy."[328] So has the Eighth Circuit, a presumptive guideline circuit, reaffirmed its pre-*Booker* caselaw holding that a preponderance of the evidence standard does not comport with due process when a guideline enhancement functions as a "tail which wags the dog of the substantive offense."[329]

Before the line of cases culminating in *Booker*, at least four other courts of appeals held or stated in *dicta* that a heightened standard of proof was required for facts with a significant, disproportionate, unreliable, or otherwise unfair impact on the sentence.[330] Defense counsel should argue that this due process rationale still applies after *Booker*, but it begs the question, why not proof beyond a reasonable doubt? If guideline facts still have an impact on sentence length whether treated as advisory as in the Ninth Circuit or presumptive as in the Eighth Circuit, and the Due Process Clause requires proof beyond a reasonable doubt to ensure the accuracy of facts that have an impact on sentence length as *Winship*, *Mullaney*, and *Apprendi* hold, it follows that beyond a reasonable doubt rather than clear and convincing evidence is required.

A panel of the Third Circuit recently held, over vigorous dissent, that the preponderance standard may be used to find that the defendant committed a separate felony because the guideline range "merely serves as one of a number of factors to be considered in fashioning the ultimate sentence," the defendant therefore had no right to jury trial, and this "ineluctably means that he or she does not enjoy the right to proof beyond a reasonable doubt."[331] In a different part of the same opinion, the majority essentially made the due process argument without appreciating its significance:

> District courts are required, under 18 U.S.C. § 3553(a), to consider the range prescribed by the Guidelines in imposing sentence on a defendant. .

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[328] *United States v. Staten*, 450 F.3d 384, 392-94 (9th Cir. 2006).

[329] *Okai*, 2006 WL 2011338 at **2-3, citing *United States v. Townley*, 929 F.2d 365, 369-70 (8th Cir. 1991).

[330] *See United States v. Shonubi*, 103 F.3d 1085, 1087-92 (2d Cir. 1997); *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.D.C. 1992); *United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir. 1992); *United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990).

[331] *United States v. Grier*, 449 F.3d 558, 564, 567 (3d Cir. 2006).

> . . The only manner by which this range can be determined is through a series of factual findings, adjusting the defendant's offense level and criminal history category. An error in these findings will result in an error in the recommended sentencing range and, thus, will necessarily impact the district court's assessment of the factors of 18 U.S.C. § 3553(a).[332]

The Third Circuit has now vacated the panel decision for rehearing *en banc*. It has ordered counsel to address whether the "Due Process Clause creates a right to proof beyond a reasonable doubt as applied to certain facts relevant to enhancements under the advisory United States Sentencing Guidelines regime in light of *United States v. Booker*, 543 U.S. 220 (2005), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and, if so, which facts."

A number of district courts after *Booker* have determined that the beyond a reasonable doubt standard is required to ensure the accuracy of guideline factfindings because they are still critically important to sentence length.[333] Other district courts use the reasonable doubt standard as a means of informing themselves of how reliable the advisory guideline range is and how much confidence they should place in it.[334] This approach has been approved by the Second and Tenth Circuits.[335]

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[332] *Id.* at 570-71.

[333] *See United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027 & n.8 (D. Neb. 2005)(Bataillon, J.) ("In order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence."); *United States v. Pimental*, 367 F. Supp. 2d 143, 153-54 (D. Mass. 2005)(Gertner, J.) ("[E]ven if the Sixth Amendment's jury trial guarantee is not directly implicated because the regime is no longer a mandatory one, the Fifth Amendment's Due Process requirement [from which the beyond a reasonable doubt standard of proof arises] is. . . . If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt."); *Kandirakis*, 2006 WL 2147610 at *35 ("Judges Gertner and Bataillon are, of course, correct. The Fifth Amendment and its *current* Supreme Court interpretation require proof beyond a reasonable doubt of enhancement facts.); *United States v. Coleman*, 370 F.Supp.2d 661, 668 (S.D. Ohio 2005) ("This Court believes that all enhancements should be determined by beyond a reasonable doubt, but, in light of *Yagar's* dicta and the multi-circuit consensus, the Court will continue to review enhancements, with the exception of those relating to acquitted conduct, by a preponderance of the evidence."). *Cf. United States v. Carvajal*, 2005 WL 476125 **4 (S.D.N.Y. Feb. 22, 2005) (declining to consider acquitted conduct in order to properly respect the jury's findings).

[334] *United States v. Gray*, 362 F.Supp.2d 714, 720-24 (S.D. W. Va. 2005); *Kandirakis*, 2006 WL 2147610 at *32-33.

[335] *United States v. Dazey*, 403 F.3d 1147, 1177 (10th Cir. 2005) ("District courts might reasonably take into consideration the strength of the evidence in support of sentencing enhancements, rather than (as in the pre- *Booker* world) looking solely to whether there was a preponderance of the evidence, and applying Guidelines-specified enhancements accordingly.");

Another approach is to argue that proof beyond a reasonable doubt, and cross-examination as well, is necessary to avoid unwarranted disparity, as required by § 3553(a)(6). As the Commission has said, "research suggested significant disparities in how [the relevant conduct] rules were applied," and "questions remain about how consistently it can be applied," given that "disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators."[336] In a recent letter to the Sentencing Commission, the Federal Defenders gave several examples of how unreliable factfinding under the guidelines' recommended procedures results in unwarranted disparity.[337]

2. Fifth Amendment Due Process Right to be Sentenced on the Basis of Accurate Information

Several circuits have held that the mere inclusion of factual allegations in a PSR transforms them to "evidence" which the judge may adopt without the government introducing any actual evidence to support them; the burden is then shifted to the defendant to rebut this multi-level hearsay with actual evidence.[338] The origin of this

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United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005) (holding that district courts are not required to count acquitted conduct; "Rather, district courts should consider the jury's acquittal when assessing the weight and quality of the evidence presented by the prosecution and determining a reasonable sentence.").

[336] Fifteen Year Report at 50. *See also* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 S.M.U. L. Rev. 211, 222 (2004) (discussing "increase in 'dry conspiracies' where no drugs were ever seized by the police and the conviction and sentence depended entirely on the dubious testimony of cooperating witnesses, even when many of these had been higher up in the chain than the defendant on trial.").

[337] Letter from Jon M. Sands, Federal Public Defender, to Hon. Ricardo Hinojosa, Chair, U.S. Sentencing Commission (July 19, 2006), Memorandum at 1-6 & Appendix, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/ defender _letter_to_ussc_71906.pdf

[338] *See United States v. Prochner*, 417 F.3d 54, 66 (1st Cir. 2005) ("PSR generally bears 'sufficient indicia of reliability,'" defendant must rebut with "countervailing proof . . . beyond defendant's self-serving words"); *United States v. Huerta*, 182 F.3d 361, 364 (5th Cir. 1999) ("sentencing judge may consider [PSR] as evidence in making the factual determinations," and "defendant's rebuttal evidence must demonstrate that the information contained in the PSR is 'materially untrue, inaccurate or unreliable,' and '[m]ere objections do not suffice'"); *United States v. Hall*, 109 F.3d 1227, 1233 (7th Cir. 1997) ("When the district court adopts the PSR's findings [here, probation officer's extrapolation of weight from dollar amounts mentioned by drug addicted informant who did not testify in person], the defendant must offer more than a bare denial of its factual allegations to mount a successful challenge."); *United States v. Terry*, 916 F.2d 157, 160-62 (4th Cir. 1990) ("defendant has an affirmative duty to make a showing that the information in the presentence report is unreliable," and unless the defendant carries that burden, the "court is 'free to adopt the findings of the [presentence report] without more specific inquiry or explanation."). The Ninth Circuit treats the PSR as "evidence" without requiring actual

jurisprudence is the Commission's policy statement.[339] Other circuits hold that the PSR is not evidence, and, therefore, the prosecution must introduce evidence in support of disputed facts.[340] As noted above, the Commission itself and the Supreme Court recognize that the information upon which guideline enhancements are based is often unreliable. As Judge Young puts it: "The system relies on 'findings' that rest on 'a mishmash of data[,] including blatantly self-serving hearsay largely served up by the Department [of Justice].'"[341] Such "procedures" turn accuracy and fairness on their head.

The guidelines' "probable accuracy" standard violates the Due Process Clause. Even in a purely discretionary system in which factfinding had no quantifiable effect at all, defendants had a right under the Due Process Clause to be sentenced on the basis of "accurate" information, not "probably accurate" information, not "misinformation," and not facts that are "materially untrue." *See Townsend v. Burke*, 334 U.S. 736, 741 (1948) (defendant has a right under the Due Process Clause to be sentenced on the basis of accurate information about his criminal history); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (defendant has a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that are "materially untrue").

3. Sixth Amendment Right to Confront and Cross-Examine Witnesses

The guidelines' invitation to use hearsay may well violate the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court applied the Confrontation Clause to bar the use at trial of out-of-court testimonial statements, including statements to law enforcement officers, regardless of whether the court deems the statement reliable. Following *Crawford* and *Booker*, the courts have questioned the

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evidence, though perhaps not going so far as to require rebuttal by the defendant. *See United States v. Maldonado*, 215 F.3d 1046, 1051 (9th Cir. 2000) ("district court may, without error, rely on evidence presented in the PSR to find by a preponderance of the evidence that the facts underlying a sentence enhancement have been established").

[339] The cases cite to prior cases that cite the assertion in § 6A1.3 that the court is free to rely on "information without regard to its admissibility under the rules of evidence," so long as it has "sufficient indicia of reliability" to support its "probable accuracy." *See United States v. Marin-Cuevas*, 147 F.3d 889, 894-95 (9th Cir. 1998); *United States v. Parker*, 133 F.3d 322, 329 (5th Cir. 1998); *United States v. Mumford*, 25 F.3d 461, 467 (7th Cir. 1994). These courts have either dropped the notion of "indicia of reliability" altogether or declared, *ipse dixit*, that the PSR *is* reliable.

[340] *See United States v. Keifer*, 198 F.3d 798, 800 (10th Cir. 1999); *United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Bernardine*, 73 F.3d 1078, 1080 (11th Cir. 1996); *United States v. Greene*, 71 F.3d 232, 236 (6th Cir. 1995); *United States v. Wise*, 976 F.2d 393, 402-03 (8th Cir. 1992); *United State v. Gessa*, 971 F.2d 1257, 1266 n.7 (6th Cir. 1992); *United States v. Prescott*, 920 F.2d 139, 143-44 (2d Cir. 1990).

[341] *Kandarakis*, 2006 WL 2147610 at *13 (citation omitted).

continuing use of testimonial hearsay at sentencing. *See United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir. 2005) ("While [the *Crawford*] rule may eventually be extended to the sentencing context, that has not happened yet."); *United Stats v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006) (*Blakely, Booker* and *Crawford* "may be a broad signal of the future," but declining to require *Crawford* at sentencing "without a clear directive from the Supreme Court."); *United States v. Gray*, 362 F.Supp.2d 714, 724-25 (S.D. W. Va. 2005) ("*Crawford v. Washington* . . . has breathed new life into the debate," but "[i]n the absence of . . . mandatory, fact-driven penalty determinations, . . . I cannot find that I am required to apply *Crawford* at sentencing.").

The courts have declined to require confrontation rights at sentencing either because the Supreme Court has not yet directed them to do so, or because the guidelines are no longer mandatory, or because *Williams v. New York*, 337 U.S. 241 (1949) has not been specifically overrruled. *See United States v. Littlesun*, 444 F.3d 1196, 1198-1200 (9th Cir. 29006); *United States v. Luciano*, 414 F.3d 174, 179 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005).

The guidelines are effectively mandatory in a majority of courts. Moreover, *Williams v. New York* is inapposite whether the guidelines are treated as advisory or mandatory. *Williams* held that a defendant had no right in a *purely discretionary state* sentencing system where the judge could impose a sentence based on "no reason at all," 337 U.S. at 252, to notice and an opportunity to confront adverse witnesses. This was based solely on principles of federalism, *i.e.*, the need to allow states to experiment with progressive sentencing systems with a rehabilitative focus. The Court did not address what procedures *were* required in such a system, other than to say sentencing was not immune from due process scrutiny. *Id.* at 252 n.18 (citing *Townsend v. Burke*, 334 U.S. 736 (1948), which held that defendants had a right to be sentenced on the basis of accurate information). In *United States v. Tucker*, 404 U.S. 443 (1972), the Court held that a defendant in a pre-guidelines federal bank robbery case had a right under the Due Process Clause not to be sentenced based on "misinformation" or facts that were "materially untrue." *Id.* at 447. In *Gardner v. Florida*, 430 U.S. 349 (1977), the Court held that a sentence based on undisclosed facts in a PSR violates Due Process Clause; although this was a capital case, the Court specifically did not rely on the Eighth Amendment but on the Due Process Clause, which would make it applicable to all sentencing proceedings. In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court held that a state defendant had a right to notice, hearing and counsel on offender characteristics that could raise the sentence. Thus, any suggestion in *Williams* that there is no right to procedures designed to ensure accuracy in sentencing -- even in a purely discretionary system -- has long been abandoned. Since the lower courts are nonetheless still waiting for the Supreme Court to explicitly overrule *Williams*, this issue should be raised in petitions for certiorari.

In the meantime, defense counsel should strongly urge the use of hearings with live witnesses and cross-examination. *See* U.S.S.G. § 6A1.3(a) ("When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.");

id., comment. (backg'd.) ("An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues."); *Gray*, 362 F. Supp.2d at 725 ("For hotly contested issues, however, the truth-seeking function of the Confrontation Clause deserves attention at sentencing. . . . The adversarial system provides the best method of establishing the reliability of testimonial evidence and the appropriate weight to assign to such evidence. Accordingly, I strongly encourage the use of witness testimony and cross-examination to resolve factual disputes at sentencing, notwithstanding my finding that *Crawford* does not apply at sentencing under the post-*Booker* sentencing regime."). *Cf. Kandirakis*, 2006 WL 2147610 at *31 (explaining court's use of jury factfinding as advice, in part because the result is likely to be more accurate since, unlike the court which must consider extra-evidence data like the pre-sentence report, the jury considers only those data that pass muster under the rules of evidence which exist to serve truth-seeking).

4. Fifth Amendment Due Process Right to Notice

There is a circuit split regarding whether a defendant must receive notice of a district court's intent to impose a sentence above the guideline range for reasons other than a guideline departure.[342] The courts that have held no notice is required have said there is no "unfair surprise" because sentencing is discretionary, includes a review of the unlimited factors set forth in § 3553(a), and defendants are aware of that.[343] According to circuits that treat the guidelines as presumptive, there is nonetheless no due process problem because defendants have notice of *Booker*, § 3553(a), and the statutory maximum.[344] The Eleventh Circuit has said that lack of notice is not plain error because there is no precedent establishing that Rule 32(h) survives *Booker*.[345] The courts that have held that notice is required have relied on Rule 32(h) and due process of law.[346] This is an issue of constitutional dimension, though it may not be plain error, depending on the circuit. Thus, defense counsel should object and seek a continuance in the district court, and raise the issue on appeal and in petitions for certiorari.

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[342] *Compare United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006) (no notice required); *United States v. Walker*, 447 F.3d 999 (7th Cir. 2006) (same); *United States v. Egenberger*, 424 F.3d 803 (8th Cir. 2006) (no notice required); *United States v. Simmerer*, 156 Fed. Appx. 124 (11th Cir. 2005) (lack of notice was not plain error) *with United States v. Evans-Martinez*, 448 F.3d 1163 (9th Cir. 2006) (lack of notice was plain error); *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006) (lack of notice was error); *United States v. Dozier*, 444 F.3d 1215 (10th Cir. 2006) (same).

[343] *See Vampire Nation*, 451 F.3d at 196; *Walker*, 447 F.3d at 1006-07.

[344] *See Walker*, 447 F.3d at 1007 n.7; *Egenberger*, 424 F.3d at 805-06.

[345] *See Simmerer*, 156 Fed. Appx. 124 at *3.

[346] *See Evans-Martinez*, 448 F.3d at 1166-67; *Davenport*, 445 F.3d at 371; *Dozier*, 444 F.3d at 1127-28.

In *Burns v. United States*, 501 U.S. 129 (1991), the Supreme Court interpreted a prior version of Fed. R. Crim. P. 32 to require that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government," the district court must "give the parties reasonable notice that it is contemplating such a ruling," and "must specifically identify the ground on which the district court is contemplating an upward departure." *Id.* at 138-39. The *Burns* holding was then incorporated into Rule 32 as subsection (h).

The Court interpreted Rule 32 to require notice to ensure that it complied with the Due Process Clause. The Court noted that the guidelines place no limit on the number of grounds for a sentence outside the guideline range, a due process concern that is more pronounced after *Booker*, not less. Efficiency was also a concern, for reasons just as applicable to sentencing under § 3553(a). The Court said:

> "Th[e] right to be heard has little reality or worth unless one is informed" that a decision is contemplated. . . . Because the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess when or on what grounds a district court might depart, much less to "comment" on such a possibility in a coherent way. . . . At best, under the Government's rendering of Rule 32, parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel might be reluctant to suggest such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines. . . . Notwithstanding the absence of express statutory language, this Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard. . . . The Court has likewise inferred other statutory protections essential to assuring procedural fairness. . . . In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause.

Burns, 501 U.S. at 136-138 (internal citations omitted).

In holding that notice is required after *Booker*, the Fourth Circuit recognized that notice ensures accuracy, and that a defendant may not be sentenced on the basis of

materially false information.[347] The position of the Seventh and Eighth Circuits that lack of notice does not offend due process because sentencing is discretionary is at odds with their position that the guidelines are presumptive. Even in circuits where the guidelines are not presumptive, "the district court must correctly calculate the applicable range, which serves as a 'starting point' in sentencing. The district court then has the discretion to sentence both above and below the range suggested by the Guidelines. Parties must receive notice the court is contemplating such a possibility in order to ensure that issues with the potential to impact sentencing are fully aired."[348] Of note, DOJ's position is that due process requires notice.[349]

One of the rationales offered by the Third Circuit is that notice would be "unworkable" because *Booker* contemplates that sentence will be imposed after the court considers the advisory guidelines, the defendant's allocution, victim statements, other evidence, and the § 3553(a) factors, and is especially concerned that no one can predict what victims will say or what effect their statements will have.[350] Sentencing courts have always been required to impose sentence after considering the guidelines, the defendant's allocution, victim statements, any evidence produced at the hearing, and any grounds for departure. This did not make notice "unworkable," and more importantly, any resulting inconvenience did not and could not overcome due process requirements. The Third Circuit's concern about the unpredictability of victim impact statements is troubling. As the Tenth Circuit recognized, if the judge forms an intent to increase the sentence based on a victim's statement, the defendant must be given an opportunity to respond.[351] This is especially true if the victim made an oral statement, the content of which the defendant had no notice. Courts must take care to ensure that defendants' constitutional rights take precedence over victims' statutory rights.[352]

C. Right to be Sentenced by an Independent Judge/Separation of Powers

Following *Booker*, judges have been heard to say that the possibility of a legislative fix is and even should be a concern in sentencing. If this means writing careful decisions considering the purposes and factors under § 3553(a), it is perfectly appropriate. If it means hewing to the guidelines, it is not. If the judge is on record to this effect, the judge's impartiality should be challenged. The current situation is probably unique, but the analogous problem of pressure on judges from outside the courtroom arises in other contexts. Here are a few examples.

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[347] *Davenport*, 445 F.3d at 371 (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

[348] *See Evans-Martinez*, 448 F.3d at 1167.

[349] *See Walker*, 447 F.3d at 1007 n.7.

[350] *Vampire Nation*, 451 F.3d at 197 & n.4.

[351] *Dozier*, 444 F.3d at 1127-28.

[352] *See Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006).

In *United States v. Spudic*, 795 F.2d 1334 (7th Cir. 1986), the Seventh Circuit disapproved of the judge's practice of meeting with a group of probation officers to determine "appropriate and fair sentences not disproportionate from other sentences in like cases." This practice was inconsistent with "rudimentary notions of fairness" because, *inter alia*, it "may have an unrecognized influence on the sentencing judge causing the judge to abide by council consensus," and "the further concern that the impact of what is subsequently presented in open court at sentencing will be minimized, that the sentence will be foreordained, and that the judge therefore enters the actual sentencing hearing without an open mind." *Id.* at 1343.

In *United States v. Brigham*, 447 F.3d 665 (9th Cir. 2006), two judges in the majority of a panel of the Ninth Circuit held that it was not plain error for the judge to participate in a "sentencing council" of judges in that district, the purpose of which was to reduce disparity. After meeting with the sentencing council, the judge imposed a 37-month sentence where the plea agreement called for 24 months. The majority made clear that it was not holding that this was or was not error, only that it was not plain error. The third judge concurred in the judgment (an *Ameline* remand), but wrote separately to disagree with the holding that use of a sentencing council in determining the defendant's sentence was not plain error: "In addition to constituting a troubling *ex parte* communication, the use of a sentencing council erodes the well-established principle that federal judges should be independent and insulated from group pressures. Article III provides life tenure and undiminished due compensation to federal judges to preserve their autonomy." *Id.* at 672 (Ferguson, J., concurring in the judgment). Further, "early constitutional debates in this country underscore the importance of judicial independence and insulation:

> [The] independence of . . . judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which . . . the influence of particular conjunctures . . . sometimes disseminate among the people themselves, and . . . have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."

Id., quoting The Federalist No. 78 (Alexander Hamilton).

In *Mistretta*, the Supreme Court was "troubled" by the argument that the Judiciary's "entanglement in the political work of the Commission" would undermine judicial impartiality in appearance or in fact, but concluded, "not without difficulty," that it would not. This was because the Commission was expected to engage in the "essentially neutral endeavor" of developing sentencing rules for judges to apply. The Court concluded that "the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing. In this case, at least, where the subject lies so close to the heart of judicial function and where the purposes of the Commission are not inherently partisan, such enlistment is not

coercion or co-optation, but merely assurance of judicial participation." *See Mistretta*, 488 U.S. at 407-08.

Michael Dwyer/MOEF/08/FDO
05/24/2007 06:50 PM

To Nancy Lanoue/IASF/08/FDO@FDO
cc
bcc
Subject Re: Seminar of 6/8/07 Materials

I would like to give everyone at the seminar a copy of Amy Baron-Evans's unpublished article *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After United States v. Booker.* I think it's the single best resource to start with before drafting any sentencing memorandum. We used it at the beginning of the briefing process in Claiborne and I have used it since for sentencing memoranda. I have a version in Word (not Word Perfect) that runs 77 pages, and I'm a little hesitant to burden you with something that is so long. Nevertheless, if I was going to give the seminar attendees the most useful thing I could provide, it would be Amy's article. I spoke to her today--we are both attenidng the Sentencing Commission's Conference in Salt Lake City--and she's more than happy to have the article diseminated at the Iowa CLE.

I'll attach my copy to this email.

-----Nancy Lanoue/IASF/08/FDO wrote: -----

To: Michael Dwyer/MOEF/08/FDO@FDO
From: Nancy Lanoue/IASF/08/FDO
Date: 05/22/2007 01:42PM
Subject: Re: Seminar of 6/8/07 Materials

That would be just great!!!

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Michael Dwyer/MOEF/08/FDO

THE FOLLOWING MATERIAL WAS TAKEN FROM AN OUTLINE USED AT THE DEFENSE ATTORNEY TRAINING AT THE SENTENCING COMMISSION SEMINAR BY AMY BARON-EVANS OF THE DEFENDERS' SENTENCING RESOURCE COUNSEL.

Materials, Resources, & General Suggestions

- Use Pending Guidelines amendments now.
  - For example, the new crack amendment indicates that the Sentencing Commission believes that the current guideline produces sentencing ranges that are greater than necessary.
  - The criminal history amendments can be used to argue that the current rules overstate criminal history and, therefore, produce guideline ranges greater than necessary.
- Challenge bad guidelines.
  - See the Defender Letters to the Sentencing Commission: http://www.fd.org/pub_SentenceLetters.htm
  - See Practitioners' Advisory Group's letters to the Sentencing Commission, http://www.usscpag.com/index.asp
- Locate reasons not to follow Guidelines in general and specific guidelines, based on history, empirical evidence, government reports, etc.
  - See Amy Baron-Evans, *The Continuing Struggle* . . .(included in your materials)
- Use studies and statistics to refine arguments about your case's relationship to section 3553(a)'s purposes of sentencing.
  - See materials collected at http://www.fd.org
- Material for defending against the Crime Victim Rights Act

- http://www.fd.org/pdf_lib/victim%20memo%20to%20defenders.pdf

- Material on Adam Walsh Act
  - http://www.fd.org/odstb_AdamWalsh.htm
- Prof. Corey Rayburn Yung's Sex Crimes blog
  - http://sexcrimes.typepad.com/sex_criimes/
- Useful source on a variety of topics
  - http://www.fd.org/odstb_BookerMain.htm#GOVT

Opportunities in Guideline Amendments Sent to Congress on May 1, 2007

- Four good, or partially good, amendments
  - The Sentencing Commission sent amendments to Congress on May 1, 2007. These amendments are posted on the Sentencing Commission's web site, www.ussc.gov.
- Use these improvements in various ways as a basis for a lower sentence now.

  Argue:
  - the guidelines are not mandatory so the new amendments should be considered now;
  - the Sentencing Commission has acknowledged through he amendment that the current guideline produces sentences that are too high; that is, greater than necessary for the purposes sentencing.
- Criminal History
  - Minor Offenses – §4A1.2(c)

- Moved fish and game violations and local ordinance violations to (c)(2)'s never-counts category
- Offense counts under (c)(1) only if the term of imprison was at least 30 days or the term of probation was **more than** one year rather than at least one year in current guideline.
- More flexibility in deciding whether a prior sentence is "similar to" a listed offense in (c)(1) or (c)(2)

- Related Cases – §4A1.2(a)(2)
  - For purpose of counting prior sentences (worth 3 points each in the Criminal History score) separately or as a single sentence
    - Still count separately if there the convictions are separated by an intervening arrest
    - If not separated by an intervening arrest, count convictions as a single sentence if
      - they are contained in the same charging document **or**
      - they sentences were imposed on the same day
  - Negative Effect
    - This amendment hurts if the priors occurred on the same occasion or were part of a single common scheme or plan and do not qualify as a single sentence under the new rule. The amendment removes the "on the same occasion" and "common scheme or plan"

language.

- Most circuits interpreted the removed language very narrowly–in contrast to nearly identical language in the relevant conduct rule.. Nevertheless, there were cases in which prior convictions counted as a single sentence under the old rule.
- If the old rule applies to your case and sentencing is scheduled on or after November 1, 2007, the court has to use the guideline in effect on the date the federal offense occurred because ex post facto concerns would require use of the old guideline.
  - There is some controversy whether ex post facto rules apply to advisory guidelines.
  - At the Sentencing Commission's annual conference this year, Assistant Solicitor General Michael Dreeben said that the government believes that ex post facto rules should apply even to advisory guidelines.
- If the offense in your federal case occurred on or after November 1, 2007, then you can argue that there would be unwarranted disparity vis a vis those to be sentenced under the old rule.

- Positive Effects
  - The following hypothetical illustrates how this amendment can be helpful

- Defendant committed 2 burglaries on different dates, was arrested for both on same date (no intervening arrest), was charged for each burglary in separate charging documents, but was sentenced for both on the same day.
- Under the current rule, Defendant gets 6 points for these two burglaries.
- Under the amended guideline, Defendant gets only 3 points for these 2 burglaries.

- If this Defendant's federal case is a felon in possession charge under 18 U.S.C. § 922(g), the amended guideline will affect his offense level. He will have only one crime of violence from these two burglaries instead of two.
  - Absent other convictions, his offense level under 2K2.1 will be 20 instead of 24. See application note 10 to 2K2.1
- This amendment will also affect the Career Offender guideline. Without the amendment, this Defendant will have 2 crimes of violence under 4B1.2; the amendment means that this Defendant will NOT be a Career Offender if he has no other convictions.

- Crack
  - The amendment will reduce crack penalties by 2 levels.
  - The Sentencing Commission issued a press release on the amendment:

http://www.ussc.gov/PRESS/rel0407.htm

- The Sentencing Commission's new report on crack is at http://www.ussc.gov/r_congress/cocaine2007.pdf
  - See pages 3 and 9 for the Sentencing Commission's explanation that it initially set the crack guidelines 2 levels higher than necessary to reach the mandatory minimum level for first offenders who received no other additions to their offense level.
  - The report suggests to Congress that it:
    - increase the 5-year and 10-year mandatory minimum threshold quantities to focus on major traffickers
    - set the difference in penalties between crack and powder at no more than 20 to 1
    - Repeal the mandatory minimum for simple possession
    - Not lower the threshold quantities for powder cocaine mandatory minimum sentences

- Grouping – §3D1.1
  - Under new §3D1.1, the grouping rules apply not only to multiple counts in the same indictment but to multiple counts in different indictments when sentences are imposed at the same time or in consolidated proceedings.
  - This new rule is consistent with the law of most circuits.

- Sentence Reduction - 1B1.13
  - 18 U.S.C. § 3582(c)(1)(A), enacted 20 years ago, says in part:
    - (A) the court, upon motion o the Director ofthe Bureau of Prisons, may reduce the term of imprisonment [of a person who is already serving a sentence] after considering the factors set forth in section 3553(a) . . . if it finds that–(i) extraordinary and compelling reasons warrant such a reduction
  - 20 years ago, Congress told the Sentencing Commission in 28 U.S.C. § 994(t), to give criteria and examples in the Guidelines for what should be considered extraordinary and compelling reasons.
    - Here is the Sentencing Commission's tardy and rather disappointing–but better than nothing–list:
      - Terminal illness
      - Permanent physical or medical condition. . . that substantially diminishes the ability of the defendant to provide self-care within a correctional facility and for which conventional treatment promises no substantial improvement
      - Experiencing deteriorating physical or mental health because of the aging process . . . that substantially diminishes the ability of the defendant to provide self-care within a correctional facility and for which conventional treatment promises no substantial improvement

- Only family member capable of caring for the defendant's minor child or children has died or become incapacitated
- Any other reason or combination of reasons as determined by the Bureau of Prisons
- Rehabilitation is not, by itself, an extraordinary and compelling reason

- Use these reasons, if they are present in your case, to argue for a lower sentence.
  - For example, if the only family member capable of caring for defendant's minor child or children has become incapacitated, the defendant should receive a sentence that allows him or her to go home.
    - Your argument is that the new amendment recognizes that foster-care is not an acceptable alternative to parental care.
    - Under the current, so-called "family circumstances" departure, the court must find that "no effective remedial or ameliorative programs are reasonably available."

- Once this guideline goes into effect on November 1, 2007, you can use it to get sentence reductions for clients already serving a sentence.
  - Such efforts will be a bit novel.
  - Authority to make such motions is in the Bureau of Prisons's hands and

the Bureau only seeks such sentence reductions when a person is in the throes of death or dead.

- However, the Bureau's role is quite limited:
  - The court upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment [of a person who is already serving a sentence] after considering the factors set forth in section 3553(a) . . . if it finds that – (i) extraordinary and compelling reasons warrant such a reduction. See 18 U.S.C. § 3582(c)(1)(A)
  - You will need to bring to the Bureau's attention the extraordinary and compelling reasons, which the Sentencing Commission has now defined.
- If the Bureau refuses to make the motion, you can litigate: See http://circuit9.blogspot.com/2007/05/neglected-compassion-reduction-of.html
- You probably not litigate until the amendment becomes effective on November 1, 2007.

- The Supreme Court, Senators Filing an Amicus Brief for the Government in *Claiborne*, and the Department of Justice All Agree: District Courts **must** be free to disagree with the Sentencing Commission as a Matter of Policy to

avoid a Sixth Amendment Violation.

- Cunningham v. California, 127 S. Ct. 856 (2007)
  - This case involves California's three-tiered sentencing system.
  - Both dissent and majority hold that in a structured sentencing system (essentially any system other than that which existed in federal courts before the Sentencing Reform Act) it is essential that sentencing courts be free to disagree with the sentencing structure on policy grounds alone.
    - That is, judges must be free to impose sentences above the statutory maximum (as *Blakely* defines that term) based on a policy concern such as deterrence or incapacitation or a belief that more punishment than the structure calls for is needed.
    - If the only way a sentencing judge can impose a sentence higher than the *Blakely*-defined statutory maximum is to predicate that increase on a factual finding, then the sentencing system violates the Sixth Amendment like the California, Washington, and pre-Booker federal systems did.
  - The disagreement between the dissent and majority in *Cunningham* was over whether the California system required judges to predicate sentences above the statutory maximum on findings of fact. The majority said it did.
    - The dissent contended that California sentencing judges could impose sentences above the statutory maximum predicated on policy grounds

alone.

- The majority disagreed and held the California system unconstitutional.

- The majority in Cunningham concluded by saying that a constitutional sentencing system must "permit judges genuinely 'to exercise broad discretion . . . within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal." 127 S. Ct. at 871.

- Amicus Brief filed on behalf of Senators Kennedy, Hatch, and Feinstein in *Claiborne v. United States*
  - Argues that district courts **should** take account of the racially disparate impact reflected in the crack guideline.
  - That is, the Senators believe that district courts should be free to disagree with policies the Sentencing Commission adopted that do not advance the purposes of sentencing.
  - The Senators explicitly disagree with the courts of appeals that outside-guidelines sentences may only be based on case-specific facts without reference to broader sentencing principles.
  - See Brief:
    - http://www.nycdl.org/ItemContent/booker/Amici_curiae_Senators.pdf
  - See Analysis of Senators' Brief:
    - http://www.fd.org/pdf_lib/critique%20of%20senators%20brief.pdf
- Government's Oral Argument in *Rita v. United States*

- Responding to Justice Scalia's question about how the system the government advocated for differed from mandatory guidelines, Deputy Solicitor General Dreeben replied, "It is different precisely on the area you yourself articulated. The judge can disagree with the sentencing guidelines." Transcript at 50.
- Dreeban just reiterated this point unambiguously at the Sentencing Commission's annual conference.

ETHICS
PANEL DISCUSSION

DEALING WITH DIFFICULT CLIENTS

PRESENTED BY

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The Difficult Criminal Client and Lawyer Ethics

Federal Criminal Law and Procedure
Spring 2007

June 8, 2007

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The Difficult Criminal Client and Lawyer Ethics

I. Related Iowa Rules of Professional Conduct and Case Law

Rule 32:1.6: Confidentially 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

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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 disclosures permitted by this rule. *See* rule 32:3.3(c).

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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.

In *Wemark v. State,* 602 N.W.2d 810, 817 (Iowa 1999), the Court ruled "a defense lawyer has no legal obligation to disclose information about the location of an instrument of a crime when possession of the instrument is not taken. (Citation omitted,) Instead a defense lawyer has a duty to preserve the confidences of the client."

In *State v. Hischke,* 639 N.W.2d 6 (Iowa 2002), the Court reviewed "what standard of knowledge is required before a lawyer may inform the court of his or client's plan to commit perjury." *Id.* at 9. Hischke contended on appeal "he was denied effective assistance of counsel when [attorney] Bishop informed the court he believed his client was going to present perjured testimony." *Id.* at 8. The Court reaffirmed its decision in *State v. Whiteside,* 272 N.W.2d 468 (Iowa 1978), where the Court

> concluded a lawyer is required to be convinced with good cause to believe the defendant's proposed testimony would be deliberately untruthful. (Citation omitted.) Moreover, the lawyer was not required to conduct an independent investigation of the facts before determining this client planned to commit perjury.

Id. at 10. The Court found attorney Bishop "performed competently and reasonably in deciding to inform the court of Hischke's [intent to commit perjury]," but the Court emphasized it was "not stating Bishop was required to take the particular course of action he chose to pursue." *Id.* at 10-11.

In *Nix v. Whiteside,* 475 U.S. 157, 106 S.C. 988, 89 L.Ed.2d 123 (1986), the Court decided "the Sixth Amendment right of a criminal defendant to assistance of counsel is [not] violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." 475 U.S. at 159 and 175 and 106 S.Ct. at 990 and 998. Discussing the attorney's responsibility in this situation the Court wrote:

> It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. (Citations omitted.) .... The commentary thus also suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony. Similarly, the Model Rules ... expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. (Citations omitted.)

475 U.S. at 169-170 and 106 S.Ct. at 995-996.

In *United States v. Long,* 857 F.2d 436 (8th Cir. 1988), the Court revisited the potential perjury of a criminal defendant issue (*Nix v. Whiteside* reviewed and overruled its opinion). On appeal, defendant Jackson claimed his sixth amendment right to effective assistance of counsel and his Fifth Amendment right to testify were violated when "his attorney abandoned his role as Jackson's advocate and coerced Jackson not to testify. He allegedly did this by suggesting to the trial judge, out of the presence of the jury, that his client might perjure himself." *Id.* at 443. The Court concluded "it is absolutely essential that a lawyer have a firm factual basis before adopting a belief of impending perjury." *Id.* at 445-446. In a footnote the Court continued: "Before disclosing to the court a belief of impending client perjury, not only must a lawyer have a firm factual basis for the belief that this or her client will commit perjury, but the lawyer must also have attempted to dissuade the client from committing the perjury. (Citation omitted.)" *Id.* at 446, Footnote 6. The Court continued:

> once the possibility of client perjury is disclosed to the trial court, the trial court should reduce the resulting prejudice. It should limit further disclosures of client confidences, inform the attorney of his other duties to his client, inform the defendant of her rights, and determine whether the defendant desires to waive any of those rights.

Id. at 446. The Court added:

> a trial court should also specifically inform a defendant of the possible consequences of false testimony: (1) the lawyer may reveal to the court what he believes to be false; (2) the lawyer may refrain from referring to the false testimony in final argument; and (3) the defendant may be prosecuted for perjury.

Id. at 446, footnote 8. Because of the prejudice that will occur, the Court concluded "defense counsel must use extreme caution before revealing a belief of impending perjury." *Id.* at 447.

In *State v. Bastedo,* 253 Iowa 103, 111 N.W.2d 255 (1961), the Court affirmed the validity of Bastedo's guilty plea based on evidence that included testimony from his former attorney; the Court quoted from C.J.S.:

> A relevant communication between lawyer and client is not privileged when offered on the issue of a breach of duty by lawyer to client, and the attorney is no

> longer bound by his obligation of secrecy when his client charges him with fraud or other improper or unprofessional conduct, and in such circumstances he may testify as to the facts.

253 Iowa at 112, 111 N.W. 2d at 260.

In *Tasby v. United States,* 504 F.2d 332 (8th Cir. 1974), the Court of Appeals recognized that at a Section 2255 hearing Tasby could impliedly waive his attorney-client privilege:

> [o]ne of the circumstances which may support a conclusion of a waiver is an attack by the client upon his attorney's conduct which calls into question the substance of their communications. A client has a privilege to keep his conversations with his attorney confidential, but that privilege is waived when a client attacks his attorney's competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raises the specter of ineffectiveness or incompetence.

Id. at 336.

In *United States v. Glass,* 761 F.2d 479 (8th Cir. 1985), the Court of Appeals condoned Glass' attorney's testimony at a postconviction evidentiary hearing where the attorney "simply stated the elements of the crime, including interstate commerce, were discussed with Glass before the plea of guilty was entered. Counsel said nothing that violated any confidence placed in him by Glass or revealed any material communication made to him by Glass." *Id.* at 480.

In *United States v. Workman,* 138 F.3d 1261 (8th Cir. 1998), the Court of Appeals observed "[t]he attorney client privilege cannot be used as both a shield and a sword. (Citation omitted.)" *Id.* 1264. The government charged Workman with multiple counts of converting government property, his father's railroad retirement checks even though his father was deceased. *Id.* at 1262. Workman's defense included the argument that his lawyer told him he could cash the checks. *Id.* Workman invoked the attorney-client privilege when the government called his lawyer, not his criminal defense lawyer, to testify. *Id.* The Court concluded that Workman implicitly waived the privilege and that he "cannot selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with [his attorney] for his own benefit." *Id.* at 1263.

Rule 32:1.14: Client with diminished capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including

consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by rule 32:1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under rule 32:1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

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[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

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Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by rule 32:1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

In *State v. Aumann*, 265 N.W.2d 316 (Iowa 1978), the Court, in a six to three opinion, held "defendant's counsel acted properly in bringing this appeal [challenging the constitutionality of a competency-to-stand trial statute], even though against the wishes of his client." *Id.* at 317. The Court wrote,

> [i]f defense counsel is allowed to pursue this appeal the only assignment of error will relate to defendant's competency. And, if defendant is in fact incompetent, his unwillingness to appeal might well derive from his lack of competence. Thus an irrational veto of the appeal by an incompetent accused might preclude any review of the incompetence.
>
> The situation falls outside the rule which usually gives defendants, rather than their attorneys, the choice of whether an appeal should be taken. The general rule in Iowa and elsewhere is that, in the absence of the consent of his client, an attorney has no authority to institute or maintain an appeal from a judgment against the client. (citations omitted)
>
> However though the client is thought to be incompetent an especially heavy and delicate responsibility falls upon his lawyer.
>
> ....
>
> The determination of defendant's counsel to pursue this appeal against what may well have been the misguided wishes of defendant was eminently proper. Indeed, we find counsel's lonely defense for the rights of his client commendable.

Id. at 318-319.

Rule 32:1.16: Declining or terminating representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Iowa Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

Comment

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Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Iowa Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. *See also* rule 32:6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under rules 32:1.6 and 32:3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in rule 32:1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if the withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee to the extent permitted by Iowa Code section 602.10116 or other law. *See* rule 32:1.15.

Rule 32:6.2: Accepting appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Iowa Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. *See* rule 32:6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, *see* rule 32:1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

Rule 32:1.2: Scope of representation and allocation of authority between client and lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 32:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of Authority between Client and Lawyer

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[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. *See* rule 32:1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. *See* rule 32:1.16(a)(3).

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Criminal, Fraudulent, and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* rule 32:1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. *See* rule 32:4.1.

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[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general

retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Iowa Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. *See* rule 32:1.4(a)(5).

Rule 32:1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 32:1.0(e), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Iowa Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

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Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* rule 32:1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. The lawyer should also discuss relevant provisions of the Standards for Professional Conduct and indicate the lawyer's intent to follow those Standards whenever possible. *See* Iowa Ct. R. ch. 33. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in rule 32:1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* rule 32:1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* rule 32:1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 32:3.4(c) directs compliance with such rules or orders.

In *In Re McMinn,* 2002 WL 31972352 (N.D. Iowa 2002), Magistrate Zoss publicly reprimanded attorney McMinn and removed her from the CJA panel for six months for "willfully violat[ing] the discovery orders entered in the Nelson case." *Id.* at 5. This matter came to the court's attention when "McMinn's transcribed notes from the Government's discovery filed in the Nelson case" were recovered by law enforcement "[w]hile executing a search warrant in a separate criminal case [.]" *Id.* at 2. McMinn acknowledged sending the materials to her client because he "seemed to be having difficulty accepting what the informant was going to say about him at trial, and [she] felt Nelson needed to see the transcript on the informant's grand jury testimony to fully understand what the informant would say at trial." *Id.* at 3. The Court found "no justification" for McMinn's action. *Id.* at 5. "The Court considers the speculation [by McMinn's attorney] that other attorneys might routinely violate the terms of the stipulated discovery order to be completely irrelevant to this situation." *Id.*

Rule 32.4.3: Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

. . . .

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur....

In *United States v. Gutierrez*, 351 F.3d 897 (8th Cir. 2003), the Court of Appeals, in a four to one opinion, rejected Gutierrez's contention "that he should have been granted a new trial

because the actions of his standby counsel deprived him of his right to sell-representation. *Id.* at 898. In his case in chief, Gutierrez intended to call his wife as a witness. *Id.* at 900. Gutierrez wanted to fire his standby counsel, Dean Grau, after he learned "Grau had referred [his wife] to the Federal Public Defender's office to obtain representation." *Id.* at 900-901. When called as a witness, Mrs. Gutierrez asserted her Fifth Amendment privilege, and the district court excused her as a witness. *Id.* at 900. Standby counsel Grau relied on Minnesota Rule of Prof'l Conduct 4.3. *Id.* at 902. The Court rejected Gutierrez's argument that "his standby counsel inappropriately interfered with his right to represent himself by advising his wife that she should consult with own counsel before testifying." *Id.* In this case, "[w]hen Grau was approached by Gutierrez's wife concerning her possible role as a witness, under Rule 4.3, he was permitted – and arguably obligated – to advise Valerie Gutierrez to seek her own counsel." *Id.*

II. Related ABA Standards for Criminal Justice (3rd ed) (1991)

Chapter 4. The Defense Function

. . . .

Part III. Lawyer-Client Relationship

. . . .

Standard 4-3.7: Advice and Service on Anticipated Unlawful Conduct

(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

(c) Defense counsel should not agree in advance of commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

Standard 4-3.8: Duty to Keep Client Informed

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Standard 4-3.9: Obligations of Hybrid and Standby Counsel

(a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

(b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

. . . .

Part V. Control and Direction of Litigation

Standard 4-5.1: Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

Standard 4-5.2: Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(i) what pleas to enter;
(ii) whether to accept a plea agreement;
(iii) whether to waive jury trial;
(iv) whether to testify in his or her own behalf; and
(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether

and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Part VI. Disposition Without Trial

Standard 4-6.1: Duty to Explore Disposition Without Trial

(a) Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

(b) Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial

Standard 4-6.2: Plea Discussions

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

(c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussion with the prosecutor.

(d) Defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.

(e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or nolo contendre pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

III. The Indigent Criminal Defendant Who Does Not Want Your Representation

In *United States v. Hart*, 557 F.2d 162 (8th Cir. 1977), the Court of Appeals rejected Hart's claim of ineffective assistance of counsel. *Id.* at 163. On the day of trial, Hart "filed a

motion to dismiss his appointed counsel on the following grounds: 1) that counsel had failed to file motion concerning jurisdiction, 2) that counsel had refused to appeal any decision made by the district court on certain motions filed by the defendant, and 3) that counsel was not ready to go to trial and had not adequately prepared for trial." *Id.* Notwithstanding these reasons and Hart's statement "that he and his counsel have been in disagreement ever since they met. The district court determined that the motions which counsel had refused to file were frivolous, that counsel's representation had not been ineffective and thus refused to dismiss appointed counsel." *Id.* Hart had the burden to "show justifiable dissatisfaction with this appointed counsel. (citations omitted) The right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice. (citation omitted)" *Id.* The Court found no "irreconcilable conflict" between Hart and his court appointed attorney. *Id.*

In *State v. Hutchison*, 341 N.W.2d 33 (Iowa 1983), the Court found "no abuse of discretion in the court's refusal to either hold a hearing or appoint substitute counsel on the second day of trial." *Id.* at 42. The district court already had held two hearings on the issue of the public defender's representation of Hutchison. *Id.* at 41. The first hearing was at a pretrial conference held one week before trial when "the public defender made a motion to withdraw as counsel because he felt a conflict was developing." *Id.* at 40. Hutchison told the district court that he was not dissatisfied with his attorney, "but stated he wanted to be able to question some of the witnesses and also have final say over what witnesses would be called and what evidence would be entered into the record." *Id.* at 40-41. At the conclusion of this pretrial conference, "all parties agreed the public defender would continue his representation with the defendant having ultimate say over trial tactics." *Id.* at 41. On the first day of trial "the defendant informed the court that he wanted to act as his own lawyer with the public defender helping him with jury selection. Again a hearing was held." *Id.* At this hearing, "[t]he court warned the defendant of the pitfalls of proceeding pro se, apprised him that the public defender would stand by in an advisory capacity, and attempted to dissuade defendant from representing himself. Defendant said he understood but persisted in defending himself. He also accepted the public defender as standby counsel...." *Id.* On the second day trial, Hutchison announced he wished to fire the public defender. *Id.* The district court did not hold another hearing, and the trial proceeded with Hutchison representing himself. *Id.* The Court distinguished this case from *United States v. Hart*; in the *Hart* case, "the defendant had not elected to represent himself and was still being represented by counsel against whom the complaints were leveled." *Id.* The Court concluded, "[w]e do not think trial court was required to disrupt the orderly process of trial at this late date and hold another full-blown hearing when the public defender had already been replaced as trial counsel so defendant could proceed pro se." *Id.* at 42.

In *United States v. Udey*, 748 F.2d 1231 (8th Cir. 1984), the Court of Appeals affirmed the district court's refusal to grant two indigent defendants' "motion for counsel of their choice in order to obtain someone who shared their beliefs about this country's tax laws." *Id.* at 1242.

In *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991), the Court of Appeals concluded "Smith showed sufficient cause for substitution of counsel when he cited both a conflict of interest between him and his appointed attorney and explained that they were unable to communicate with each other." *Id.* at 1321. At the time that the sole public defender in the

county was appointed to represent Smith, "Smith objected to the poor representation Marquette had offered other defendants, as well as the fact that Marquette served as a municipal judge in Crawford County. The judge apparently construed this as a waiver of the right to counsel and told Smith he would proceed pro se." *Id.* at 1317. A little over one month later,

> Smith and five other named prisoners in the Crawford County jail filed a pro se class action lawsuit in federal court naming Judge Langston, the public defender Marquette, and others as defendants. The §1983 suit alleged a conspiracy of Crawford County officials to violate the rights of defendants, including the rights to a speedy trial and the effective assistance of counsel. (footnote omitted)

Id. The Court recognized this standard:

> [a] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, and irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. (citations omitted) Once good cause is shown, the trial judge must appoint different counsel. (citations omitted)

Id. at 1320. In a footnote, the Court addressed Smith's §1983 lawsuit:

> [w]e recognize the danger of any holding implying that defendants can manufacture conflicts of interest by initiating lawsuits against their attorneys. (citation omitted) A patently frivolous lawsuit brought by defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel. Trial judges must be wary of defendants who employ complaints about counsel as dilatory tactics or for some other invidious motive. (citation omitted)

Id. at 1321, n. 11.

In *United States v. Swinney*, 970 F.2d 494 (8th Cir. 1992), the Court of Appeals addressed the issue of hybrid representation. Defendant

> Willis contend[ed] the district court committed error in refusing to allow him to represent himself *pro se* with the assistance of standby counsel. .... Defendants in criminal trials have a constitutional right to waive the assistance of counsel and conduct their own defense. (citation omitted) A court, however, may appoint standby counsel to assist a defendant you chooses to proceed *pro se*. (citation omitted) The defendant remains free, of course, to elevate standby counsel to a lead counsel role, thereby waiving the defendant's *Faretta* rights. (citation omitted). .... The defendant, however, does not have a constitutional right to hybrid representation. (citation omitted) That is, the defendant cannot demand the right to act as co-counsel. (citation omitted) Thus, the district court may properly require the defendant to choose either to proceed *pro se*, with or without the help of standby counsel, or to utilize full assistance of counsel, who would present the defendant's case. (citation omitted)

Id. at 498.

A second issue raised by Willis in the *Swinney* case was whether "the district court committed error in denying his request for a continuance and appointment of new standby counsel." *Id.* at 498. The Court wrote, "[o]n the second day of trial, Willis and his attorney requested that the court allow the attorney to withdraw from Willis's case, citing the contentious relationship between them. Willis, however, did not request that the court remove his attorney so he could proceed *pro se*." *Id.* at 498-499. The district court concluded that the reasons stated by Willis and his attorney did not justify a continuance or the appointment of substitute "counsel with the trial already in progress. .... In short, the court concluded the antagonistic relationship between Willis and his attorney was not unusual given Willis's abrasiveness and hostility towards the attorneys working on his behalf and, thus, did not warrant a continuance or the appointment of new standby counsel." *Id.* at 499. In affirming the district court's exercise of its discretion, the Court wrote: "[t]he defendant's right to counsel, however, 'does not involve the right to a "meaningful relationship" between an accused and his counsel.' (citations omitted)" *Id.* In finding no abuse of discretion by the district court, the Court noted,

> [a]t times, Willis and his attorney were not on friendly terms. Nevertheless, Willis was uninhibited in stating what path he thought his defense should take. Willis's attorney kept his composure and listened to Willis under trying circumstances, and Willis has failed to show that his attorney failed zealously to represent him because of their abrasive relationship. Furthermore, the record supports the district court's conclusion that Willis had difficulties with his attorneys because of his own conduct, and there was "no reason to [believe] ... any lawyer [could] work with Mr. Willis any better than [his court-appointed attorney]." According to the district court, Willis "tr[ied] to control his defense in an unusual way," and when in chambers, Willis continually interrupted his attorney and the court to make frivolous arguments.

Id.

In *United States v. Webster*, 84 F.3d 1056 (8th Cir. 1996), the Court of Appeals rejected the "Hobson's choice" allusion that Webster's Sixth Amendment right to self-representation was violated when his choice was "continued representation by a lawyer in whom he had lost all trust or proceeding *pro se* with that same attorney serving as standby counsel." *Id.* at 1062. The Court wrote, "[t]he options offered by the district court, characterized by Webster as a 'Hobson's choice,' represented a reasonable balance between a respect for Webster's asserted rights and an understandable desire to prevent disruption of an almost concluded trial. (citation omitted)" *Id.* at 1063.

In *State v. Rater*, 568 N.W.2d 655 (Iowa 1997), Rater had concerns about his fourth court-appointed attorney. *Id.* at 656-657. At the hearing to address whether a fifth attorney should be appointed to represent Rater, he "contended that Blazek was refusing to assert the issues and defenses Rater believed were meritorious." *Id.* at 657. The district court ordered Rater to obtain a psychological evaluation, and Blazek remained as his attorney. *Id.* About one

month later, Rater again asked that Blazek be replaced, and Blazek filed a motion to withdraw. *Id.* At the hearing to address these issues, "[t]he court determined that Blazek was competent counsel and that Rater could either proceed to trial with Blazek as his counsel or proceed to trial with Blazek as his stand-by counsel. .... [T]he court's final order continued Blazek as stand-by counsel." *Id.* In a subsequent pretrial conference and on the first day of trial, Rater "again told the court he not feel comfortable representing himself at trial." *Id.* The trial judge determined that this issue had been resolved, and the trial proceeded with Rater representing himself and Blazek serving as stand-by counsel. *Id.* at 658. The district court "did not engage in an inquiry to determine whether the defendant's waiver [of counsel] was knowing and intelligent. This matter was of particular importance, given attorney Blazek's concern and that of attorney B. John Burns, who initially represented the defendant, as to the defendant's competence to stand trial. (citation omitted)" *Id.* at 660. The Court noted the trial court's failure "to conduct an inquiry to ensure the defendant's waiver of [his Sixth Amendment right to counsel] was knowing and intelligent" is not satisfied by "the appointment of stand-by counsel...." (citations omitted) *Id.* at 661. "The Court also noted, "while a defendant has a right to waive the assistance of counsel and conduct his own defense, if stand-by counsel is appointed, the defendant 'remains free ... to elevate stand-by counsel to a lead counsel role, thereby waiving the defendant's *Faretta* right.' (citation omitted)" *Id.* In reversing Rater's conviction, the Court held

> an insufficient inquiry was conducted by the trial court to ensure that Rater's waiver of his right to counsel was intelligent, done knowingly with an awareness of the pitfalls inherent in self-representation, and that defendant was competent to make that decision. We hold that for lack of sufficient inquiry by the court, a valid waiver of Rater's Sixth Amendment right to counsel did not occur. Further, we hope that even if proper inquiry had occurred, the court erred in denying Rater's later waiver of his right of self-representation.

Id. at 662.

In *State v. Thompson*, 597 N.W.2d 779 (Iowa 1999), the Court rejected Thompson's argument that the district court abused its discretion in refusing to appoint new counsel to represent him "immediately prior to the start of trial...." *Id.* at 781-782. The Court noted, "Thompson's request came only moments before trial began, the court made a thorough inquiry into the adequacy of [attorney] Ellerhoff's preparation, and questioned Ellerhoff as to whether any conflicts existed at that time." *Id.* at 782. The issue of whether Ellerhoff should continue as Thompson's lawyer arose again following the presentation of evidence. *Id.* at 781. While the district court was considering whether an aiding and abetting instruction should be given, "Thompson realized that he had implicated himself through his testimony at trial and became quite upset. .... The record shows that Thompson then struck Ellerhoff in the face, causing an injury which required medical attention." *Id.* Although Thompson never requested a different attorney following this altercation, Thompson contended on appeal "he received ineffective assistance of counsel because, following the assault, Ellerhoff had a potential cause of action against him which presented a conflict of interest." *Id.* The Court noted,

> [a]lthough the court did not conduct a lengthy inquiry prior to the resumption of proceedings following Thompson's assault of Ellerhoff, it did ask Ellerhoff

> whether he was "prepared to make a final argument on behalf of" Thompson. This inquiry gave Ellerhoff the opportunity to inform the court of any misgivings he had about continuing his representation of Thompson. Moreover, the defendant was present at the proceeding and had ample opportunity to raise any concerns he had about a possible conflict of interest.

Id. The Court found that the district court "made an adequate inquiry into the alleged conflict sufficient to satisfy the principle enunciated in *Cuyler*." *Id.* Rejecting Thompson's ineffective assistance of counsel argument, the Court wrote "this alleged conflict arose at a time when Ellerhoff's possible enmity toward his client arising from the assault provided little opportunity for Ellerhoff to adversely affect the course of the trial. All of the evidence had been presented...." *Id.* at 785. The Court wrote, "[w]e will not assume that counsel intentionally gave a poor performance in his closing arguments in hopes of obtaining revenge against his client for the assault." *Id.*

In *United States v. Exson*, 328 F.3d 456 (8th Cir. 2003), the Court of Appeals found no abuse of discretion by the district court in "declining to grant Exson's motions for new counsel." *Id.* at 461.

> Exson complained [to the district court] that his attorney was on friendly terms with the prosecutor, that his counsel had refused to file motions which the court found baseless, and that he was generally dissatisfied. .... Exson himself contributed to the difficulties about which he complained in that he refused to meet with his appointed attorney or respond to communications from his counsel, and he failed to show that his claims of dissatisfaction or his asserted conflict of interest affected counsel's performance.

Id. at 460-461.

In *United States v. Thompson*, 335 F.3d 782 (8th Cir. 2003), the Court of Appeals confirmed Thompson's convictions that yielded a 120 month sentence. *Id.* at 783, 785. Thompson appealed his conviction, and counsel was appointed to represent him. *Id.* at 783-784. "[H]owever, Thompson's attorney filed a motion to withdraw claiming Thompson threatened to kill him." *Id.* at 784. The Court ordered Thompson to respond to this motion, but Thompson failed to do so. *Id.* The Court granted the motion to withdraw, and "[t]hereafter, Thompson filed two motions for appointment of new counsel which were both denied." *Id.* "Thompson failed to file a brief and his appeal was dismissed." *Id.* The Court "recognize[d] Thompson's constitutional right to be represented by counsel on appeal. (citation omitted) A criminal defendant may, however, by virtue of his actions forfeit his constitutional rights. (citations omitted) Similarly, 'a defendant who is abusive toward his attorney may forfeit his right to counsel.' (citation omitted)" *Id.* at 785. The Court concluded,

> Thompson's attorney alleged Thompson threatened to kill him if he did not withdraw. Thompson was given opportunity to refute the allegation but ignored our order to submit a response. Faced with counsel's undisputed allegation, this court granted the motion to withdraw and refused to appoint new counsel. In light

> of the seriousness of the allegation, and Thompson's willful failure to submit any explanation or otherwise refute the allegation, our refusal to appoint substitute counsel did not unconstitutionally abridge Thompson's right to be represented on appeal.

Id.

In *State v. Tejeda*, 677 N.W.2d 744 (Iowa 2004), the Court concluded "[t]he district court had a duty to inquire into a potential breakdown in communication between Tejeda and his trial counsel." *Id.* at 755. The Court preserved this issue for review in Tejeda's postconviction proceeding. *Id.* Tejeda wrote two letters to a district judge in February 2003 asking that substitute counsel be appointed. *Id.* at 747-748. A different district court judge invited the parties to respond to Tejeda's request, but no one did. *Id.* at 748. The district court held no hearing, and there was no order "denying Tejeda's request." *Id.* Referring to what the Court implied in *State v. Lopez*, 633 N.W.2d 774 (Iowa 2001), the Court "now explicitly recognize[s] that there is a duty of inquiry once a defendant requests through counsel on account of an alleged breakdown in communication. (citations omitted)" *Id.* at 749-750. The Court's opinion continued,

> [t]his is not to say courts must conduct a hearing every time a dissatisfied defendant lodges a complaint about his attorney. In this case the defendant did more than simply ask for counsel of his choice; Tejeda indicated the relationship with his attorney had deteriorated so far that he was withholding evidence from his attorney. (citation omitted) Having received a colorable complaint, the district court should have inquired into whether there was "a complete breakdown in communication between the attorney and the defendant" to the extent Tejeda's Sixth Amendment right to counsel was violated. (citation omitted)

Id. at 751-752.

In *United States v. Mentzos*, 462 F.3d 830 (8th Cir. 2006), *cert. denied*, 2007 WL 1110680 (U.S. Apr. 16, 2007), the Court of Appeals concluded "Mentzos's decision to represent himself was not rendered involuntary simply because the court required him to choose between qualified counsel and self-representation." *Id.* at 839. Mentzos filed three motions to substitute court-appointed counsel in 2004. *Id.* at 834. Shortly after the filing of the first motion to substitute counsel, assistant public defender Tilsen was replaced by chief public defender Scott. *Id.* The district court denied all three motions to substitute counsel. *Id.* Chief public defender Scott filed two motions to withdraw, the second of which the district court granted in February 2005. *Id.* The district court appointed a private attorney, Michael Davis, to represent Mentzos. *Id.* at 835. Three weeks later, Mentzos filed his fourth motion requesting appointment of new counsel or, alternatively, requesting that he be allowed to represent himself. *Id.* The district court denied Mentzos's request for substituted counsel and conducted a *Faretta* hearing. *Id.* The district "court found that Mentzos knowingly and voluntarily waived his right to counsel and would be permitted to represent himself, but requested that Davis serve as standby counsel." *Id.* at 836. The Court's opinion continued, "Mentzos represented himself for the first three days of his trial before invoking his right to counsel, at which point the court appointed Davis to

represent him. The government called two final witnesses, and then the defense rested without presenting a case." *Id.* In addressing whether the waiver of the right to appointed counsel was knowing and voluntary, the Court wrote, "[a]lthough a defendant need not have the skill and experience of a lawyer to invoke his right to self-representation, the court must make the defendant aware of the dangers and disadvantages of self-representation. (citation omitted)" *Id.* at 838. The Court wrote,

> [b]efore allowing Mentzos to act as his own attorney at trial, the court twice evaluated his competency to represent himself and conducted a thorough *Faretta* hearing, during which it repeatedly warned Mentzos against representing himself, stressed the disadvantages of this choice, and advised Mentzos that the court thought it was a mistake not to accept the assistance of counsel. (citation omitted)

Id.

In *Hannan v. State*, 2007 WL 1518940 (Iowa May 25, 2007), the Court concluded that Hannan's "right to counsel was violated...." *Id.* at 1. Prior to trial, Hannan filed three motions to substitute counsel; the district court granted the first two of these motions. *Id.* Following a hearing on the third motion, the district court appointed a fourth attorney. *Id.* at 2. The district judge admonished Hannan, '"you have gotten Dennis Faber. He is your attorney. .... He is it. From now on, you keep him or you represent yourself."' *Id.* Faber had limited experience, and he filed a motion to appoint co-counsel; when Hannan learned of Faber's inexperience, he told Faber he did not want his representation; Faber then filed a motion to withdraw. *Id.* The district court allowed Faber to withdraw, but the district court appointed him to '"sit at counsel table during the trial."' *Id.* The district court made it clear, Hannan was "proceeding pro se...." *Id.* at 3. Following his conviction and unsuccessful appeal, Hannan's *pro se* postconviction relief application raised the issue of an improper waiver of his right to counsel. *Id.* Since

> [a] proper waiver must be voluntary, knowing, and intelligent[,] (citation omitted) .... [t]he surrounding circumstances will determine the sufficient of a colloquy. (citation omitted) .... A sufficient colloquy will necessarily look into "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." (citations omitted) In addition, the defendant must be "admonished as to the usefulness of an attorney at that particular proceeding, and made cognizant of the danger in continuing without counsel. (citation omitted)"

Id. at 6. In conclusion, the Court was "sympathetic to judges in this perilous position [,] (citation omitted)" ... but "emphasize[d], however, that a motion for substitute counsel should not be granted without cause and that proper rulings on such motions can help to avoid violations of constitutional rights. (citation omitted" *Id.* at 8.

The Difficult Criminal Client and Lawyer Ethics

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The Difficult Criminal Client and Lawyer Ethics

I. Related Iowa Rules of Professional Conduct and Case Law

Rule 32:1.6: Confidentially 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

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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 disclosures permitted by this rule. *See* rule 32:3.3(c).

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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.

In *Wemark v. State,* 602 N.W.2d 810, 817 (Iowa 1999), the Court ruled "a defense lawyer has no legal obligation to disclose information about the location of an instrument of a crime when possession of the instrument is not taken. (Citation omitted,) Instead a defense lawyer has a duty to preserve the confidences of the client."

In *State v. Hischke,* 639 N.W.2d 6 (Iowa 2002), the Court reviewed "what standard of knowledge is required before a lawyer may inform the court of his or client's plan to commit perjury." *Id.* at 9. Hischke contended on appeal "he was denied effective assistance of counsel when [attorney] Bishop informed the court he believed his client was going to present perjured testimony." *Id.* at 8. The Court reaffirmed its decision in *State v. Whiteside,* 272 N.W.2d 468 (Iowa 1978), where the Court

> concluded a lawyer is required to be convinced with good cause to believe the defendant's proposed testimony would be deliberately untruthful. (Citation omitted.) Moreover, the lawyer was not required to conduct an independent investigation of the facts before determining this client planned to commit perjury.

Id. at 10. The Court found attorney Bishop "performed competently and reasonably in deciding to inform the court of Hischke's [intent to commit perjury]," but the Court emphasized it was "not stating Bishop was required to take the particular course of action he chose to pursue." *Id.* at 10-11.

In *Nix v. Whiteside,* 475 U.S. 157, 106 S.C. 988, 89 L.Ed.2d 123 (1986), the Court decided "the Sixth Amendment right of a criminal defendant to assistance of counsel is [not] violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial." 475 U.S. at 159 and 175 and 106 S.Ct. at 990 and 998. Discussing the attorney's responsibility in this situation the Court wrote:

> It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. (Citations omitted.) .... The commentary thus also suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony. Similarly, the Model Rules ... expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. (Citations omitted.)

475 U.S. at 169-170 and 106 S.Ct. at 995-996.

In *United States v. Long,* 857 F.2d 436 (8th Cir. 1988), the Court revisited the potential perjury of a criminal defendant issue (*Nix v. Whiteside* reviewed and overruled its opinion). On appeal, defendant Jackson claimed his sixth amendment right to effective assistance of counsel and his Fifth Amendment right to testify were violated when "his attorney abandoned his role as Jackson's advocate and coerced Jackson not to testify. He allegedly did this by suggesting to the trial judge, out of the presence of the jury, that his client might perjure himself." *Id.* at 443. The Court concluded "it is absolutely essential that a lawyer have a firm factual basis before adopting a belief of impending perjury." *Id.* at 445-446. In a footnote the Court continued: "Before disclosing to the court a belief of impending client perjury, not only must a lawyer have a firm factual basis for the belief that this or her client will commit perjury, but the lawyer must also have attempted to dissuade the client from committing the perjury. (Citation omitted.)" *Id.* at 446, Footnote 6. The Court continued:

> once the possibility of client perjury is disclosed to the trial court, the trial court should reduce the resulting prejudice. It should limit further disclosures of client confidences, inform the attorney of his other duties to his client, inform the defendant of her rights, and determine whether the defendant desires to waive any of those rights.

Id. at 446. The Court added:

> a trial court should also specifically inform a defendant of the possible consequences of false testimony: (1) the lawyer may reveal to the court what he believes to be false; (2) the lawyer may refrain from referring to the false testimony in final argument; and (3) the defendant may be prosecuted for perjury.

Id. at 446, footnote 8. Because of the prejudice that will occur, the Court concluded "defense counsel must use extreme caution before revealing a belief of impending perjury." *Id.* at 447.

In *State v. Bastedo,* 253 Iowa 103, 111 N.W.2d 255 (1961), the Court affirmed the validity of Bastedo's guilty plea based on evidence that included testimony from his former attorney; the Court quoted from C.J.S.:

> A relevant communication between lawyer and client is not privileged when offered on the issue of a breach of duty by lawyer to client, and the attorney is no

> longer bound by his obligation of secrecy when his client charges him with fraud or other improper or unprofessional conduct, and in such circumstances he may testify as to the facts.

253 Iowa at 112, 111 N.W. 2d at 260.

In *Tasby v. United States,* 504 F.2d 332 (8th Cir. 1974), the Court of Appeals recognized that at a Section 2255 hearing Tasby could impliedly waive his attorney-client privilege:

> [o]ne of the circumstances which may support a conclusion of a waiver is an attack by the client upon his attorney's conduct which calls into question the substance of their communications. A client has a privilege to keep his conversations with his attorney confidential, but that privilege is waived when a client attacks his attorney's competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raises the specter of ineffectiveness or incompetence.

Id. at 336.

In *United States v. Glass,* 761 F.2d 479 (8th Cir. 1985), the Court of Appeals condoned Glass' attorney's testimony at a postconviction evidentiary hearing where the attorney "simply stated the elements of the crime, including interstate commerce, were discussed with Glass before the plea of guilty was entered. Counsel said nothing that violated any confidence placed in him by Glass or revealed any material communication made to him by Glass." *Id.* at 480.

In *United States v. Workman,* 138 F.3d 1261 (8th Cir. 1998), the Court of Appeals observed "[t]he attorney client privilege cannot be used as both a shield and a sword. (Citation omitted.)" *Id.* 1264. The government charged Workman with multiple counts of converting government property, his father's railroad retirement checks even though his father was deceased. *Id.* at 1262. Workman's defense included the argument that his lawyer told him he could cash the checks. *Id.* Workman invoked the attorney-client privilege when the government called his lawyer, not his criminal defense lawyer, to testify. *Id.* The Court concluded that Workman implicitly waived the privilege and that he "cannot selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with [his attorney] for his own benefit." *Id.* at 1263.

Rule 32:1.14: Client with diminished capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including

consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by rule 32:1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under rule 32:1.6 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

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[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

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Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by rule 32:1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

In *State v. Aumann*, 265 N.W.2d 316 (Iowa 1978), the Court, in a six to three opinion, held "defendant's counsel acted properly in bringing this appeal [challenging the constitutionality of a competency-to-stand trial statute], even though against the wishes of his client." *Id.* at 317. The Court wrote,

> [i]f defense counsel is allowed to pursue this appeal the only assignment of error will relate to defendant's competency. And, if defendant is in fact incompetent, his unwillingness to appeal might well derive from his lack of competence. Thus an irrational veto of the appeal by an incompetent accused might preclude any review of the incompetence.
>
> The situation falls outside the rule which usually gives defendants, rather than their attorneys, the choice of whether an appeal should be taken. The general rule in Iowa and elsewhere is that, in the absence of the consent of his client, an attorney has no authority to institute or maintain an appeal from a judgment against the client. (citations omitted)
>
> However though the client is thought to be incompetent an especially heavy and delicate responsibility falls upon his lawyer.
>
> ....
>
> The determination of defendant's counsel to pursue this appeal against what may well have been the misguided wishes of defendant was eminently proper. Indeed, we find counsel's lonely defense for the rights of his client commendable.

Id. at 318-319.

Rule 32:1.16: Declining or terminating representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Iowa Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

Comment

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Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Iowa Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. *See also* rule 32:6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under rules 32:1.6 and 32:3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in rule 32:1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if the withdrawal can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee to the extent permitted by Iowa Code section 602.10116 or other law. *See* rule 32:1.15.

Rule 32:6.2: Accepting appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Iowa Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. *See* rule 32:6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, *see* rule 32:1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

Rule 32:1.2: Scope of representation and allocation of authority between client and lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 32:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of Authority between Client and Lawyer

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[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. *See* rule 32:1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. *See* rule 32:1.16(a)(3).

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Criminal, Fraudulent, and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See* rule 32:1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. *See* rule 32:4.1.

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[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general

retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Iowa Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. *See* rule 32:1.4(a)(5).

Rule 32:1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 32:1.0(e), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Iowa Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

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Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* rule 32:1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. The lawyer should also discuss relevant provisions of the Standards for Professional Conduct and indicate the lawyer's intent to follow those Standards whenever possible. *See* Iowa Ct. R. ch. 33. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in rule 32:1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* rule 32:1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* rule 32:1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 32:3.4(c) directs compliance with such rules or orders.

In *In Re McMinn,* 2002 WL 31972352 (N.D. Iowa 2002), Magistrate Zoss publicly reprimanded attorney McMinn and removed her from the CJA panel for six months for "willfully violat[ing] the discovery orders entered in the Nelson case." *Id.* at 5. This matter came to the court's attention when "McMinn's transcribed notes from the Government's discovery filed in the Nelson case" were recovered by law enforcement "[w]hile executing a search warrant in a separate criminal case [.]" *Id.* at 2. McMinn acknowledged sending the materials to her client because he "seemed to be having difficulty accepting what the informant was going to say about him at trial, and [she] felt Nelson needed to see the transcript on the informant's grand jury testimony to fully understand what the informant would say at trial." *Id.* at 3. The Court found "no justification" for McMinn's action. *Id.* at 5. "The Court considers the speculation [by McMinn's attorney] that other attorneys might routinely violate the terms of the stipulated discovery order to be completely irrelevant to this situation." *Id.*

Rule 32.4.3: Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

. . . .

[2] The rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur....

In *United States v. Gutierrez*, 351 F.3d 897 (8th Cir. 2003), the Court of Appeals, in a four to one opinion, rejected Gutierrez's contention "that he should have been granted a new trial

because the actions of his standby counsel deprived him of his right to sell-representation. *Id.* at 898. In his case in chief, Gutierrez intended to call his wife as a witness. *Id.* at 900. Gutierrez wanted to fire his standby counsel, Dean Grau, after he learned "Grau had referred [his wife] to the Federal Public Defender's office to obtain representation." *Id.* at 900-901. When called as a witness, Mrs. Gutierrez asserted her Fifth Amendment privilege, and the district court excused her as a witness. *Id.* at 900. Standby counsel Grau relied on Minnesota Rule of Prof'l Conduct 4.3. *Id.* at 902. The Court rejected Gutierrez's argument that "his standby counsel inappropriately interfered with his right to represent himself by advising his wife that she should consult with own counsel before testifying." *Id.* In this case, "[w]hen Grau was approached by Gutierrez's wife concerning her possible role as a witness, under Rule 4.3, he was permitted – and arguably obligated – to advise Valerie Gutierrez to seek her own counsel." *Id.*

II. Related ABA Standards for Criminal Justice (3rd ed) (1991)

Chapter 4. The Defense Function

. . . .

Part III. Lawyer-Client Relationship

. . . .

Standard 4-3.7: Advice and Service on Anticipated Unlawful Conduct

(a) It is defense counsel's duty to advise a client to comply with the law, but counsel may advise concerning the meaning, scope, and validity of a law.

(b) Defense counsel should not counsel a client in or knowingly assist a client to engage in conduct which defense counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

(c) Defense counsel should not agree in advance of commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.

(d) Defense counsel should not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except that defense counsel may reveal such information to the extent he or she reasonably believes necessary to prevent the client from committing a criminal act that defense counsel believes is likely to result in imminent death or substantial bodily harm.

Standard 4-3.8: Duty to Keep Client Informed

(a) Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Standard 4-3.9: Obligations of Hybrid and Standby Counsel

(a) Defense counsel whose duty is to actively assist a pro se accused should permit the accused to make the final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

(b) Defense counsel whose duty is to assist a pro se accused only when the accused requests assistance may bring to the attention of the accused matters beneficial to him or her, but should not actively participate in the conduct of the defense unless requested by the accused or insofar as directed to do so by the court.

. . . .

Part V. Control and Direction of Litigation

Standard 4-5.1: Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

Standard 4-5.2: Control and Direction of the Case

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

(i) what pleas to enter;
(ii) whether to accept a plea agreement;
(iii) whether to waive jury trial;
(iv) whether to testify in his or her own behalf; and
(v) whether to appeal.

(b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether

and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

(c) If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

Part VI. Disposition Without Trial

Standard 4-6.1: Duty to Explore Disposition Without Trial

(a) Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies.

(b) Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial

Standard 4-6.2: Plea Discussions

(a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the prosecutor.

(b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

(c) Defense counsel should not knowingly make false statements concerning the evidence in the course of plea discussion with the prosecutor.

(d) Defense counsel should not seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.

(e) Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty or nolo contendre pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

III. The Indigent Criminal Defendant Who Does Not Want Your Representation

In *United States v. Hart*, 557 F.2d 162 (8th Cir. 1977), the Court of Appeals rejected Hart's claim of ineffective assistance of counsel. *Id.* at 163. On the day of trial, Hart "filed a

motion to dismiss his appointed counsel on the following grounds: 1) that counsel had failed to file motion concerning jurisdiction, 2) that counsel had refused to appeal any decision made by the district court on certain motions filed by the defendant, and 3) that counsel was not ready to go to trial and had not adequately prepared for trial." *Id.* Notwithstanding these reasons and Hart's statement "that he and his counsel have been in disagreement ever since they met. The district court determined that the motions which counsel had refused to file were frivolous, that counsel's representation had not been ineffective and thus refused to dismiss appointed counsel." *Id.* Hart had the burden to "show justifiable dissatisfaction with this appointed counsel. (citations omitted) The right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice. (citation omitted)" *Id.* The Court found no "irreconcilable conflict" between Hart and his court appointed attorney. *Id.*

In *State v. Hutchison*, 341 N.W.2d 33 (Iowa 1983), the Court found "no abuse of discretion in the court's refusal to either hold a hearing or appoint substitute counsel on the second day of trial." *Id.* at 42. The district court already had held two hearings on the issue of the public defender's representation of Hutchison. *Id.* at 41. The first hearing was at a pretrial conference held one week before trial when "the public defender made a motion to withdraw as counsel because he felt a conflict was developing." *Id.* at 40. Hutchison told the district court that he was not dissatisfied with his attorney, "but stated he wanted to be able to question some of the witnesses and also have final say over what witnesses would be called and what evidence would be entered into the record." *Id.* at 40-41. At the conclusion of this pretrial conference, "all parties agreed the public defender would continue his representation with the defendant having ultimate say over trial tactics." *Id.* at 41. On the first day of trial "the defendant informed the court that he wanted to act as his own lawyer with the public defender helping him with jury selection. Again a hearing was held." *Id.* At this hearing, "[t]he court warned the defendant of the pitfalls of proceeding pro se, apprised him that the public defender would stand by in an advisory capacity, and attempted to dissuade defendant from representing himself. Defendant said he understood but persisted in defending himself. He also accepted the public defender as standby counsel...." *Id.* On the second day trial, Hutchison announced he wished to fire the public defender. *Id.* The district court did not hold another hearing, and the trial proceeded with Hutchison representing himself. *Id.* The Court distinguished this case from *United States v. Hart*; in the *Hart* case, "the defendant had not elected to represent himself and was still being represented by counsel against whom the complaints were leveled." *Id.* The Court concluded, "[w]e do not think trial court was required to disrupt the orderly process of trial at this late date and hold another full-blown hearing when the public defender had already been replaced as trial counsel so defendant could proceed pro se." *Id.* at 42.

In *United States v. Udey*, 748 F.2d 1231 (8th Cir. 1984), the Court of Appeals affirmed the district court's refusal to grant two indigent defendants' "motion for counsel of their choice in order to obtain someone who shared their beliefs about this country's tax laws." *Id.* at 1242.

In *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991), the Court of Appeals concluded "Smith showed sufficient cause for substitution of counsel when he cited both a conflict of interest between him and his appointed attorney and explained that they were unable to communicate with each other." *Id.* at 1321. At the time that the sole public defender in the

county was appointed to represent Smith, "Smith objected to the poor representation Marquette had offered other defendants, as well as the fact that Marquette served as a municipal judge in Crawford County. The judge apparently construed this as a waiver of the right to counsel and told Smith he would proceed pro se." *Id.* at 1317. A little over one month later,

> Smith and five other named prisoners in the Crawford County jail filed a pro se class action lawsuit in federal court naming Judge Langston, the public defender Marquette, and others as defendants. The §1983 suit alleged a conspiracy of Crawford County officials to violate the rights of defendants, including the rights to a speedy trial and the effective assistance of counsel. (footnote omitted)

Id. The Court recognized this standard:

> [a] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, and irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. (citations omitted) Once good cause is shown, the trial judge must appoint different counsel. (citations omitted)

Id. at 1320. In a footnote, the Court addressed Smith's §1983 lawsuit:

> [w]e recognize the danger of any holding implying that defendants can manufacture conflicts of interest by initiating lawsuits against their attorneys. (citation omitted) A patently frivolous lawsuit brought by defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel. Trial judges must be wary of defendants who employ complaints about counsel as dilatory tactics or for some other invidious motive. (citation omitted)

Id. at 1321, n. 11.

In *United States v. Swinney*, 970 F.2d 494 (8th Cir. 1992), the Court of Appeals addressed the issue of hybrid representation. Defendant

> Willis contend[ed] the district court committed error in refusing to allow him to represent himself *pro se* with the assistance of standby counsel. .... Defendants in criminal trials have a constitutional right to waive the assistance of counsel and conduct their own defense. (citation omitted) A court, however, may appoint standby counsel to assist a defendant you chooses to proceed *pro se*. (citation omitted) The defendant remains free, of course, to elevate standby counsel to a lead counsel role, thereby waiving the defendant's *Faretta* rights. (citation omitted). .... The defendant, however, does not have a constitutional right to hybrid representation. (citation omitted) That is, the defendant cannot demand the right to act as co-counsel. (citation omitted) Thus, the district court may properly require the defendant to choose either to proceed *pro se*, with or without the help of standby counsel, or to utilize full assistance of counsel, who would present the defendant's case. (citation omitted)

Id. at 498.

A second issue raised by Willis in the *Swinney* case was whether "the district court committed error in denying his request for a continuance and appointment of new standby counsel." *Id.* at 498. The Court wrote, "[o]n the second day of trial, Willis and his attorney requested that the court allow the attorney to withdraw from Willis's case, citing the contentious relationship between them. Willis, however, did not request that the court remove his attorney so he could proceed *pro se*." *Id.* at 498-499. The district court concluded that the reasons stated by Willis and his attorney did not justify a continuance or the appointment of substitute "counsel with the trial already in progress. .... In short, the court concluded the antagonistic relationship between Willis and his attorney was not unusual given Willis's abrasiveness and hostility towards the attorneys working on his behalf and, thus, did not warrant a continuance or the appointment of new standby counsel." *Id.* at 499. In affirming the district court's exercise of its discretion, the Court wrote: "[t]he defendant's right to counsel, however, 'does not involve the right to a "meaningful relationship" between an accused and his counsel.' (citations omitted)" *Id.* In finding no abuse of discretion by the district court, the Court noted,

> [a]t times, Willis and his attorney were not on friendly terms. Nevertheless, Willis was uninhibited in stating what path he thought his defense should take. Willis's attorney kept his composure and listened to Willis under trying circumstances, and Willis has failed to show that his attorney failed zealously to represent him because of their abrasive relationship. Furthermore, the record supports the district court's conclusion that Willis had difficulties with his attorneys because of his own conduct, and there was "no reason to [believe] ... any lawyer [could] work with Mr. Willis any better than [his court-appointed attorney]." According to the district court, Willis "tr[ied] to control his defense in an unusual way," and when in chambers, Willis continually interrupted his attorney and the court to make frivolous arguments.

Id.

In *United States v. Webster*, 84 F.3d 1056 (8th Cir. 1996), the Court of Appeals rejected the "Hobson's choice" allusion that Webster's Sixth Amendment right to self-representation was violated when his choice was "continued representation by a lawyer in whom he had lost all trust or proceeding *pro se* with that same attorney serving as standby counsel." *Id.* at 1062. The Court wrote, "[t]he options offered by the district court, characterized by Webster as a 'Hobson's choice,' represented a reasonable balance between a respect for Webster's asserted rights and an understandable desire to prevent disruption of an almost concluded trial. (citation omitted)" *Id.* at 1063.

In *State v. Rater*, 568 N.W.2d 655 (Iowa 1997), Rater had concerns about his fourth court-appointed attorney. *Id.* at 656-657. At the hearing to address whether a fifth attorney should be appointed to represent Rater, he "contended that Blazek was refusing to assert the issues and defenses Rater believed were meritorious." *Id.* at 657. The district court ordered Rater to obtain a psychological evaluation, and Blazek remained as his attorney. *Id.* About one

month later, Rater again asked that Blazek be replaced, and Blazek filed a motion to withdraw. *Id.* At the hearing to address these issues, "[t]he court determined that Blazek was competent counsel and that Rater could either proceed to trial with Blazek as his counsel or proceed to trial with Blazek as his stand-by counsel. .... [T]he court's final order continued Blazek as stand-by counsel." *Id.* In a subsequent pretrial conference and on the first day of trial, Rater "again told the court he not feel comfortable representing himself at trial." *Id.* The trial judge determined that this issue had been resolved, and the trial proceeded with Rater representing himself and Blazek serving as stand-by counsel. *Id.* at 658. The district court "did not engage in an inquiry to determine whether the defendant's waiver [of counsel] was knowing and intelligent. This matter was of particular importance, given attorney Blazek's concern and that of attorney B. John Burns, who initially represented the defendant, as to the defendant's competence to stand trial. (citation omitted)" *Id.* at 660. The Court noted the trial court's failure "to conduct an inquiry to ensure the defendant's waiver of [his Sixth Amendment right to counsel] was knowing and intelligent" is not satisfied by "the appointment of stand-by counsel...." (citations omitted) *Id.* at 661. "The Court also noted, "while a defendant has a right to waive the assistance of counsel and conduct his own defense, if stand-by counsel is appointed, the defendant 'remains free ... to elevate stand-by counsel to a lead counsel role, thereby waiving the defendant's *Faretta* right.' (citation omitted)" *Id.* In reversing Rater's conviction, the Court held

> an insufficient inquiry was conducted by the trial court to ensure that Rater's waiver of his right to counsel was intelligent, done knowingly with an awareness of the pitfalls inherent in self-representation, and that defendant was competent to make that decision. We hold that for lack of sufficient inquiry by the court, a valid waiver of Rater's Sixth Amendment right to counsel did not occur. Further, we hope that even if proper inquiry had occurred, the court erred in denying Rater's later waiver of his right of self-representation.

Id. at 662.

In *State v. Thompson*, 597 N.W.2d 779 (Iowa 1999), the Court rejected Thompson's argument that the district court abused its discretion in refusing to appoint new counsel to represent him "immediately prior to the start of trial...." *Id.* at 781-782. The Court noted, "Thompson's request came only moments before trial began, the court made a thorough inquiry into the adequacy of [attorney] Ellerhoff's preparation, and questioned Ellerhoff as to whether any conflicts existed at that time." *Id.* at 782. The issue of whether Ellerhoff should continue as Thompson's lawyer arose again following the presentation of evidence. *Id.* at 781. While the district court was considering whether an aiding and abetting instruction should be given, "Thompson realized that he had implicated himself through his testimony at trial and became quite upset. .... The record shows that Thompson then struck Ellerhoff in the face, causing an injury which required medical attention." *Id.* Although Thompson never requested a different attorney following this altercation, Thompson contended on appeal "he received ineffective assistance of counsel because, following the assault, Ellerhoff had a potential cause of action against him which presented a conflict of interest." *Id.* The Court noted,

> [a]lthough the court did not conduct a lengthy inquiry prior to the resumption of proceedings following Thompson's assault of Ellerhoff, it did ask Ellerhoff

> whether he was "prepared to make a final argument on behalf of" Thompson. This inquiry gave Ellerhoff the opportunity to inform the court of any misgivings he had about continuing his representation of Thompson. Moreover, the defendant was present at the proceeding and had ample opportunity to raise any concerns he had about a possible conflict of interest.

Id. The Court found that the district court "made an adequate inquiry into the alleged conflict sufficient to satisfy the principle enunciated in *Cuyler*." *Id.* Rejecting Thompson's ineffective assistance of counsel argument, the Court wrote "this alleged conflict arose at a time when Ellerhoff's possible enmity toward his client arising from the assault provided little opportunity for Ellerhoff to adversely affect the course of the trial. All of the evidence had been presented...." *Id.* at 785. The Court wrote, "[w]e will not assume that counsel intentionally gave a poor performance in his closing arguments in hopes of obtaining revenge against his client for the assault." *Id.*

In *United States v. Exson*, 328 F.3d 456 (8th Cir. 2003), the Court of Appeals found no abuse of discretion by the district court in "declining to grant Exson's motions for new counsel." *Id.* at 461.

> Exson complained [to the district court] that his attorney was on friendly terms with the prosecutor, that his counsel had refused to file motions which the court found baseless, and that he was generally dissatisfied. .... Exson himself contributed to the difficulties about which he complained in that he refused to meet with his appointed attorney or respond to communications from his counsel, and he failed to show that his claims of dissatisfaction or his asserted conflict of interest affected counsel's performance.

Id. at 460-461.

In *United States v. Thompson*, 335 F.3d 782 (8th Cir. 2003), the Court of Appeals confirmed Thompson's convictions that yielded a 120 month sentence. *Id.* at 783, 785. Thompson appealed his conviction, and counsel was appointed to represent him. *Id.* at 783-784. "[H]owever, Thompson's attorney filed a motion to withdraw claiming Thompson threatened to kill him." *Id.* at 784. The Court ordered Thompson to respond to this motion, but Thompson failed to do so. *Id.* The Court granted the motion to withdraw, and "[t]hereafter, Thompson filed two motions for appointment of new counsel which were both denied." *Id.* "Thompson failed to file a brief and his appeal was dismissed." *Id.* The Court "recognize[d] Thompson's constitutional right to be represented by counsel on appeal. (citation omitted) A criminal defendant may, however, by virtue of his actions forfeit his constitutional rights. (citations omitted) Similarly, 'a defendant who is abusive toward his attorney may forfeit his right to counsel.' (citation omitted)" *Id.* at 785. The Court concluded,

> Thompson's attorney alleged Thompson threatened to kill him if he did not withdraw. Thompson was given opportunity to refute the allegation but ignored our order to submit a response. Faced with counsel's undisputed allegation, this court granted the motion to withdraw and refused to appoint new counsel. In light

> of the seriousness of the allegation, and Thompson's willful failure to submit any explanation or otherwise refute the allegation, our refusal to appoint substitute counsel did not unconstitutionally abridge Thompson's right to be represented on appeal.

Id.

In *State v. Tejeda*, 677 N.W.2d 744 (Iowa 2004), the Court concluded "[t]he district court had a duty to inquire into a potential breakdown in communication between Tejeda and his trial counsel." *Id.* at 755. The Court preserved this issue for review in Tejeda's postconviction proceeding. *Id.* Tejeda wrote two letters to a district judge in February 2003 asking that substitute counsel be appointed. *Id.* at 747-748. A different district court judge invited the parties to respond to Tejeda's request, but no one did. *Id.* at 748. The district court held no hearing, and there was no order "denying Tejeda's request." *Id.* Referring to what the Court implied in *State v. Lopez*, 633 N.W.2d 774 (Iowa 2001), the Court "now explicitly recognize[s] that there is a duty of inquiry once a defendant requests through counsel on account of an alleged breakdown in communication. (citations omitted)" *Id.* at 749-750. The Court's opinion continued,

> [t]his is not to say courts must conduct a hearing every time a dissatisfied defendant lodges a complaint about his attorney. In this case the defendant did more than simply ask for counsel of his choice; Tejeda indicated the relationship with his attorney had deteriorated so far that he was withholding evidence from his attorney. (citation omitted) Having received a colorable complaint, the district court should have inquired into whether there was "a complete breakdown in communication between the attorney and the defendant" to the extent Tejeda's Sixth Amendment right to counsel was violated. (citation omitted)

Id. at 751-752.

In *United States v. Mentzos*, 462 F.3d 830 (8th Cir. 2006), *cert. denied*, 2007 WL 1110680 (U.S. Apr. 16, 2007), the Court of Appeals concluded "Mentzos's decision to represent himself was not rendered involuntary simply because the court required him to choose between qualified counsel and self-representation." *Id.* at 839. Mentzos filed three motions to substitute court-appointed counsel in 2004. *Id.* at 834. Shortly after the filing of the first motion to substitute counsel, assistant public defender Tilsen was replaced by chief public defender Scott. *Id.* The district court denied all three motions to substitute counsel. *Id.* Chief public defender Scott filed two motions to withdraw, the second of which the district court granted in February 2005. *Id.* The district court appointed a private attorney, Michael Davis, to represent Mentzos. *Id.* at 835. Three weeks later, Mentzos filed his fourth motion requesting appointment of new counsel or, alternatively, requesting that he be allowed to represent himself. *Id.* The district court denied Mentzos's request for substituted counsel and conducted a *Faretta* hearing. *Id.* The district "court found that Mentzos knowingly and voluntarily waived his right to counsel and would be permitted to represent himself, but requested that Davis serve as standby counsel." *Id.* at 836. The Court's opinion continued, "Mentzos represented himself for the first three days of his trial before invoking his right to counsel, at which point the court appointed Davis to

represent him. The government called two final witnesses, and then the defense rested without presenting a case." *Id.* In addressing whether the waiver of the right to appointed counsel was knowing and voluntary, the Court wrote, "[a]lthough a defendant need not have the skill and experience of a lawyer to invoke his right to self-representation, the court must make the defendant aware of the dangers and disadvantages of self-representation. (citation omitted)" *Id.* at 838. The Court wrote,

> [b]efore allowing Mentzos to act as his own attorney at trial, the court twice evaluated his competency to represent himself and conducted a thorough *Faretta* hearing, during which it repeatedly warned Mentzos against representing himself, stressed the disadvantages of this choice, and advised Mentzos that the court thought it was a mistake not to accept the assistance of counsel. (citation omitted)

Id.

In *Hannan v. State*, 2007 WL 1518940 (Iowa May 25, 2007), the Court concluded that Hannan's "right to counsel was violated...." *Id.* at 1. Prior to trial, Hannan filed three motions to substitute counsel; the district court granted the first two of these motions. *Id.* Following a hearing on the third motion, the district court appointed a fourth attorney. *Id.* at 2. The district judge admonished Hannan, '"you have gotten Dennis Faber. He is your attorney. .... He is it. From now on, you keep him or you represent yourself."' *Id.* Faber had limited experience, and he filed a motion to appoint co-counsel; when Hannan learned of Faber's inexperience, he told Faber he did not want his representation; Faber then filed a motion to withdraw. *Id.* The district court allowed Faber to withdraw, but the district court appointed him to '"sit at counsel table during the trial."' *Id.* The district court made it clear, Hannan was "proceeding pro se...." *Id.* at 3. Following his conviction and unsuccessful appeal, Hannan's *pro se* postconviction relief application raised the issue of an improper waiver of his right to counsel. *Id.* Since

> [a] proper waiver must be voluntary, knowing, and intelligent[,] (citation omitted) .... [t]he surrounding circumstances will determine the sufficient of a colloquy. (citation omitted) .... A sufficient colloquy will necessarily look into "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." (citations omitted) In addition, the defendant must be "admonished as to the usefulness of an attorney at that particular proceeding, and made cognizant of the danger in continuing without counsel. (citation omitted)"

Id. at 6. In conclusion, the Court was "sympathetic to judges in this perilous position [,] (citation omitted)" ... but "emphasize[d], however, that a motion for substitute counsel should not be granted without cause and that proper rulings on such motions can help to avoid violations of constitutional rights. (citation omitted" *Id.* at 8.