

PROGRAM

- 8:00 a.m. to 8:30 a.m. **Registration**
- 8:30 a.m. **Introduction**
Nick Drees
Federal Public Defender
- 8:30 a.m. to 9:15 a.m. **Investigator Panel**
Gordon Gratiyas, Gratiyas Investigations, Des Moines, Iowa
Delbert King, King & Associates, Urbandale, Iowa
Tom Hofbauer, Des Moines Federal Public Defender's Office
- 9:15 a.m. to 10:00 a.m. **Panel - Plea Negotiations:**
Dealing with Prosecutors and Difficult Clients
Jane Kelly
Timothy Ross-Boon
Mike Smart
Diane Zitzner
Assistant Federal Public Defenders
- 10:00 a.m. to 10:15 a.m. **Break**
- 10:15 a.m. to 11:15 a.m. **Cross Examining Snitches**
Angela Campbell
Monty Brown
CJA Attorneys, Des Moines, Iowa
- 11:15 a.m. to 12:15 **Supreme Court & Eighth Circuit Update**
John Messina
Research & Writing Attorney
Federal Public Defender's Office
Des Moines, Iowa
- 12:15 p.m. to 1:30 p.m. **Lunch (On your own)**
- 1:30 p.m. to 2:30 p.m. **BOP Issues: Designations Under § 3621 and 2nd Chance Act**
Mary A. Noland, Senior CLC Attorney
Laura Mason, Regional Correctional Programs Administrator
Federal Bureau of Prisons
Kansas City, Kansas
- 2:30 p.m. to 3:00 p.m. **Humanizing the Sentencing Process**
Kent Simmons
CJA Attorney, Davenport, Iowa
- 3:00 p.m. to 3:15 p.m. **Break**
- 3:15 p.m. to 4:15 p.m. **Ethics**
Matthew McDermott
CJA Attorney, Des Moines, Iowa

MONTGOMERY BROWN

EDUCATION: J.D., Drake University (1986); B.A., Buena Vista University (1983)

PROFESSIONAL: Brown & Scott, P.L.C. (2008-Present); Cook, Brown & Scott, P.L.C. (1998-2008); Cook, Gotsdiner & McEnroe & McCarthy (1990-1998); Assistant County Attorney, Dallas County Attorney's Office (1986-1990).

ANGELA CAMPBELL

EDUCATION: J.D., Boston College (2002); B.A., Yale University (1999)

PROFESSIONAL: Dickey & Campbell Law Firm (2007-Present); Adjunct Professor, Drake Law School (2007-Present); Assistant Federal Public Defender, Southern District of Iowa (2003-2007); Law Clerk to the Honorable C. Arlen Beam, U.S. Circuit Judge, Eighth Circuit Court of Appeals (2002-2003).

NICK DREES

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

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

GORDON GRATIAS

PROFESSIONAL: Gordon Gratias secured his private investigation license in October 1971 after working two years for another private investigator. He has been Founder and past President of the Iowa Association of Private Investigators and was the Chairperson of the Ethics Committee of that Association for seven years. As Chairperson, he heard the ethical complaints made against private investigators in the State of Iowa and ruled on said complaints. He also served on the Judicial Nominating Commission which is an appointment made by Governor Brandstad. The Commission interviews attorneys that are applying for appointment as a District Court Judge. They select the top two candidates then submit their names to the Governor for his selection. He has served in this capacity for ten years. He is a member of the Mid America Association of Technical Accident Investigators in addition to being a member of the National Association of Certified Fraud Examiners and being certified as a fraud examiner in 1993. He is currently the chairperson of the Board of Regents for The Academy of Private Investigators.

TOM HOFBAUER

EDUCATION: A.A. Iowa Central Community College (1996); Iowa Law Enforcement Academy (1987)

PROFESSIONAL: Investigator, Federal Public Defender's Office (2002-Present); Webster County Deputy Sheriff (1995-2002); Ft. Dodge Police Officer (1987-1995).

DELBERT KING

EDUCATION: FBI National Academy, Quantico, VA (1982); Criminal Justice, Simpson College (1980); AA in Law Enforcement, DMAAC (1976); Graduate Iowa Law Enforcement Academy and other police oriented schools.

PROFESSIONAL: 34 years in law enforcement. Last 25 years the Commanding Officer of the Urbandale Police Criminal Investigation Division. Retired as a Detective Lieutenant in 2002. Last 12 years in law enforcement, I represented Iowa Law Enforcement (appeal, state, county, municipal) as Executive Board Member, Mid-States Organized Crime Information Center - Surrounding 9 states - Law Enforcement Intelligence Data Base located in Springfield, Missouri. I was elected 4 times by my peers.

LAURA MASON

EDUCATION: M.S.W. Rutgers University (2001); B.S. Criminology & Sociology, University of Southern California (1997)

PROFESSIONAL: Regional Correctional Programs Administrator (April 2008); Deputy Regional Correctional Programs Administrator (2006-April 2008), 15 years of correctional experience with the Federal Bureau of Prisons; 12 years experience with Correctional Programs.

MATT MCDERMOTT

EDUCATION: J.D., University of California at Berkeley (2003); B.A., University of Iowa (2000) Matt served as Executive Editor of the California Law Review while at the University of California, Berkeley.

PROFESSIONAL: Matt is a partner at Belin Lamson McCormick Zumbach Flynn, P.C., in Des Moines. His practice consists principally of commercial litigation and criminal defense, including appellate practice. In his criminal law practice, Matt has represented both individuals and corporations in a variety of prosecutions and investigations in both state and federal court. He serves on the Board of Governors of the Iowa State Bar Association, and is President of the Young Lawyers Division. Matt currently chairs the Task Force on Supreme Court Ethics Opinions published in The Iowa Lawyer magazine, and is a frequent speaker on legal ethics.

JOHN MESSINA

EDUCATION: J.D., Drake University Law School (1979); B.A., Drake University (1975)

PROFESSIONAL: Research and Writing Attorney, Federal Public Defender's Office, Southern District of Iowa (2001-Present); Assistant State Appellate Defender, Iowa State Appellate's Office (1996-2001 and 1984-1988); Assistant Attorney General in the Criminal Appeals and Research Division (1980-1984).

MARY NOLAND

EDUCATION: J.D. with honors, Drake University (1995); B.A., University of Notre Dame, Government & International Relations.

PROFESSIONAL: Senior Consolidated Litigation Center Attorney, North Central Regional Office (2005-present), Legislative Liaison, Department of Corrections (2003-2005), BOP attorney (1996-2003), Judicial Law Clerk, Ia. Ct. of Appeals (1995-1996), 14 years correctional law experience.

TIMOTHY S. ROSS-BOON

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

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

KENT SIMMONS

EDUCATION: J.D., University of Iowa (1980); B.A. University of Iowa in Political Science (1977)

PROFESSIONAL: Solo practitioner for 24 of the 28 years in practice.

MIKE SMART

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

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

DIANE ZITZNER

EDUCATION: J.D., University of Iowa (1994); Graduate of University of Wisconsin-Madison (1990)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2007 - Present); Assistant Public Defender, Wisconsin State Public Defender Agency (1995-2007)

INVESTIGATOR PANEL

PRESENTED BY

GORDON GRATIAS,

DELBERT KING,

PRIVATE INVESTIGATORS

DES MOINES, IOWA

AND

TOM HOFBAUER, FPD OFFICE

DES MOINES, IOWA

WHY HIRE INVESTIGATORS

WHY NOT?

- No cost to attorney; fees paid by court or by client
- Covering yourself; client cannot accuse you of not using investigative tools at your disposal, doing everything possible on their case
- Investigator can testify as to his/her findings
- Free up attorney's time to do other things
- Investigator often times provides different perspective on case
 - Can evaluate police investigation
 - What did they not do
- Investigator can "size up" witness for attorney
 - Is witness favorable or unfavorable to case
 - Face to face interviews preferred
- Locate hard to find witnesses
- Investigator can update attorney as to progress on a regular basis
 - Keep your client informed
 - Provide oral or written reports
- Observe witness body language
- Investigator familiar with area
 - Familiar with criminal element

NOTES:

SPECIALTIES:

- Take written or tape recorded statements in the field
- Surveillance
- Video depositions
- Background investigations on client, witnesses, prosecution witnesses

Locate expert witnesses

Body language

Process service

Often times Investigator already familiar with witness

Easier to locate

Photography, video, measurements, etc.

Secure cell phone and tower records

NOTES:

FINDING AN INVESTIGATOR:

All investigators in Iowa are licensed through the Iowa Department of Public Safety.

All investigators are required to be insured and bonded.

Search yellow pages

Iowa Association of Private Investigators website:

www.iowa-investigators.com

Check references

Check experience-How long has he/she been in business

What is his/hers reputation

What is his/her expertise

NOTES:

INTERVIEWS A BEHAVIORAL APPROACH

Watch witness

We communicate in two ways: VERBAL & NONVERBAL

Verbal: 60%

Non Verbal: 40%

You cannot rehearse what your body will do during questioning

Examples:

Innocent suspects will be LESS nervous as time goes on during the interview.

Typical deceptive behavior attitudes:

- **Overly anxious-they don't appear rational**
- **Overly polite-they will become your buddy**
- **Defensive-to the point of aggression**
- **Evasive-mostly with verbal responses**
- **Complaining-time, room temperature, thirsty**
- **Rationalizing-from the beginning**
- **Unconcerned-repeat offenders**

Be wary of the following:

- **"To be perfectly honest"**
- **"To be quite frank"**
- **"Honestly"**
- **"I swear to god"**
- **"I swear on a stack of bibles"**

NON VERBAL, BEHAVIOR SYMPTOMS

Truthful examples:

- Upright
- Open and relaxed
- Lean forward from time to time
- Frontally aligned
- Casual, natural posture changes

Deceptive:

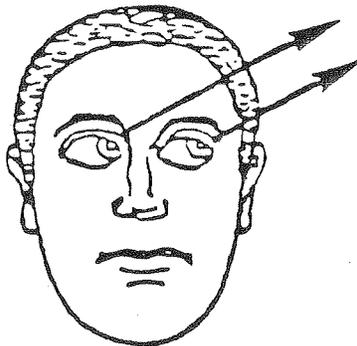
- Slouching
- Very ridged
- Not frontally aligned
- Barrired posture
- Lack of interest
- Runners position
- Rubbing and wringing on hand
- Scratching
- Pulling of nose or earlobes
- Licking lips, clearing throat, coughing
- Yawns
- Nail inspection
- Wiping sweat from forehead
- Leg bouncing
- Lint picking
- Head or chin on hand
- Hiding hands or feet
- Hiding mouth

Crossing the arms.....	11% truth.....	22% deception
Crossing legs.....	14% truth.....	85% deception
Feet under the chair.....	9% truth.....	90% deception
Putting hand on back of head.....	5% truth.....	95% deception
Lint picker.....	8% truth.....	95% deception
Claims to be cold.....	0% truth.....	100% deception

NOTES:

UP AND LEFT: (Visual processor of information).

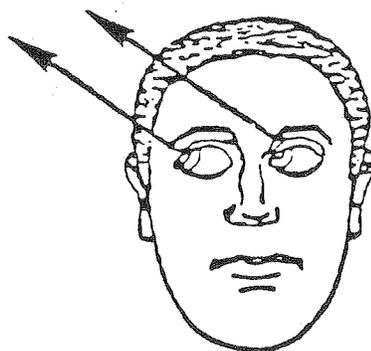
Seeing a mental image of something the individual saw previously, returning to see it again, a **truthful indication**.



Eyes up and to the left:
Recalling something seen
before — a visual memory.

UP AND RIGHT: (Visual)

The individual is constructing a visual image. They are trying to picture or create something that they have not seen. An indication of **deception**.

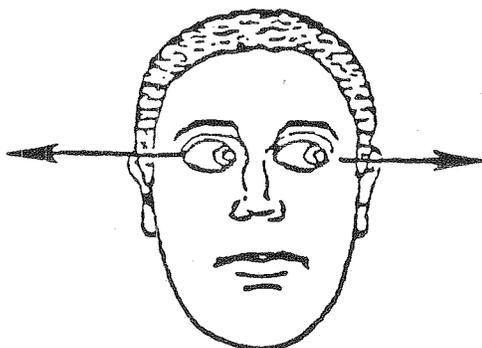


Eyes up and to the right:
Visualizing something that
has not been seen before.

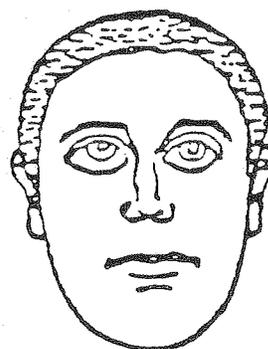
HORIZONTAL, LEFT, RIGHT: (Auditory)

Horizontal and to the left indicates the processing of information heard before, a **truthful indication**.

Horizontal and to the right, the creation of sounds not heard before, **an indication of deception**.



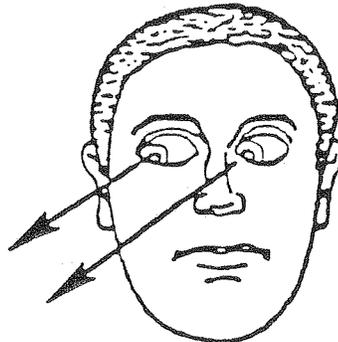
Eyes horizontal, looking left or right: Making sense of sounds one is hearing at the moment, recalling sounds from memory, or imagining sounds — auditory processing.



Eyes staring into space and not focused, with some pupil dilation: Either visual recall or visualizing something that has never been seen before.

DOWN AND RIGHT: (Kinesthetic)

The individual is processing emotional input. Seeing how one “feels” about the information. Not always a sign of deception but an indication of a topic of high Importance to the individual.

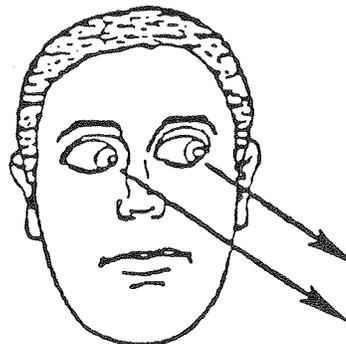


Eyes down and to the right:
Sensing how the body
feels — processing
kinesthetic input.

DOWN AND LEFT: (Kinesthetic)

The person is carrying on a dialogue, interacting with a past experience of some significance, usually more reliable as to integrity.

NOTE - The last two categories should be evaluated with other, and usually are accompanied by, eye movements.



Eyes down and to the left:
Talking to oneself — an
internal dialogue in the
auditory mode.

PANEL
PLEA NEGOTIATIONS:
DEALING WITH PROSECUTORS
AND
DIFFICULT CLIENTS

PRESENTED BY

JANE KELLY,
TIMOTHY S. ROSS-BOON,
MIKE SMART,
DIANE ZITZNER,
ASST. FEDERAL PUBLIC
DEFENDERS

Northern District of Iowa Sample Provisions from Proposed Plea Agreements

Federal Defender/CJA Panel Seminar
May 21, 2009

CHARGES AND PENALTIES

...

5. _____ Defendant understands and agrees defendant has the absolute right to plead guilty before a United States District Court Judge. However, if convenient to the Court, defendant agrees to waive and give up this right and to plead guilty before a United States Magistrate Judge. Defendant understands defendant will not be found guilty unless the United States District Court Judge accepts the plea of guilty or adopts a recommendation of the Magistrate Judge to accept such plea. Defendant agrees to execute the attached consent to proceed before the United States Magistrate Judge.

...

STIPULATION OF FACTS

7. _____ By initialing each of the following paragraphs, defendant stipulates to the following facts. Defendant agrees these facts are true and may be used to establish a factual basis for defendant's guilty plea and sentence. Defendant has been advised by defendant's attorney of defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. Defendant waives these rights and agrees this stipulation may be used against defendant at any time in any proceeding should defendant violate or refuse to follow through on this plea agreement, regardless of whether the plea agreement has been accepted by the Court. Defendant agrees that the stipulation below is a summary of the facts against defendant and does not constitute all of the facts the government would be able to prove at trial and may be able to prove to the Court in accordance with this agreement.

[Every imaginable fact included here.]

SENTENCING PROVISIONS

8. _____ Defendant understands and agrees to be sentenced based on facts to be found by the sentencing judge by a preponderance of the evidence and agrees facts essential to the punishment need not be (1) charged in the Indictment; (2) proven

to a jury; or (3) proven beyond a reasonable doubt. Defendant agrees the Court will determine the appropriate sentence after considering a variety of factors, including: (1) the nature and circumstances of the offense and the history and characteristics of defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence to afford adequate deterrence to criminal conduct; (4) the need for the sentence to protect the public from further crimes of defendant; (5) the need for the sentence to provide defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (6) the need to avoid unwarranted sentencing disparities among defendants with similar criminal records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense. Defendant understands the Court will also consider the kinds of sentence and the sentencing range established by the United States Sentencing Guidelines for the applicable category of offense(s) committed by defendant and will consider any pertinent policy statements issued as part of the Guidelines. The Court will consider relevant adjustments under the United States Sentencing Guidelines, which will include a review of such things as defendant's role in the offense, criminal history, acceptance or lack of acceptance of responsibility, and other considerations. The Court may also consider other information including any information concerning the background, character, and conduct of defendant.

9. _____ The parties stipulate and agree the United States Sentencing Guidelines should be applied, at least, as follows:

_____ **A. Firearm Offense Level (Chapter 2):** Pursuant to USSG §2K2.1(a), the base offense level is **at least 20** because of the [crime of violence], Docket Number XXX, referred to in paragraph (C)(2).

_____ **B. Acceptance of Responsibility (Chapter 3 adjustment):** The United States agrees for purposes of USSG §3E1.1(a) that defendant timely notified authorities of defendant's intention to enter a guilty plea.

_____ **C. Criminal History (Chapter 4):** No agreement has been reached regarding defendant's criminal history. The parties reserve the right to contest the Probation Office's determination of defendant's criminal history and criminal history category under Chapter Four of the sentencing guidelines. In addition, defendant understands that, if defendant's criminal history would result in a higher base offense level under any guideline, the government is free to seek such a base offense level.

_____ **D.** No other agreements have been reached, and the parties are free to litigate any and all other applicable adjustments, departures, or cross-references under the United States Sentencing Guidelines. However, the parties agree there are no grounds for a variance of any

kind from the advisory guideline range, in any amount, in either direction.

10. _____ Defendant, defendant's attorney, and the United States may make whatever comment and evidentiary offer they deem appropriate at the time of the guilty plea, sentencing, or any other proceeding related to this case, so long as the offer or comment does not violate any other provision of this agreement. The parties are also free to provide all relevant information and controlling authority to the Probation Office and Court for use in preparing and litigating adjustments, enhancements, or departures scored in the presentence report, including offering statements made by defendant at any time.

11. _____ The parties are free to contest or defend any ruling of the Court, unless otherwise limited by this agreement, on appeal or in any other post-conviction proceeding.

CONDITIONS OF SUPERVISION

12. _____ If probation or a term of supervised release is ordered, the parties are free to seek whatever conditions they deem appropriate.

POTENTIAL FOR DEPARTURE OR CREDIT

13. _____ Defendant understands and agrees the United States will not make a motion for downward departure under §5K1.1 or any other provision of the United States Sentencing Guidelines or under 18 U.S.C. § 3553(e) or any other provision of law.

FINANCIAL MATTERS

14. _____ Defendant agrees to pay a special assessment of \$100, as required by 18 U.S.C. § 3013. Using the enclosed payment coupon, defendant or defendant's representative will send or deliver the special assessment payment to the U.S. District Clerk of Court, 4200 C Street SW, Cedar Rapids, IA 52404. Payment must be in the form of a money order made out to the "U.S. District Clerk of Court." The special assessment must be paid before this signed agreement is returned to the U.S. Attorney's Office. If defendant fails to pay the special assessment prior to the sentencing, defendant stipulates that a downward adjustment for acceptance of responsibility under USSG §3E1.1 is not appropriate unless the Court finds defendant has no ability to pay prior to the sentencing.

...

WAIVER OF APPEAL

25. _____ After conferring with defendant's attorney and after being advised

of defendant's appeal rights, defendant knowingly and voluntarily waives defendant's right to appeal the conviction and the sentence imposed, or to request or receive any reduction in sentence by operation of 18 U.S.C. § 3582(c)(2). Defendant also waives the right to file post-conviction relief actions, including actions pursuant to 18 U.S.C. § 3582(c)(2), 28 U.S.C. § 2255, 28 U.S.C. § 2241, *coram nobis*, and motions to reconsider or reduce defendant's sentence. Defendant retains the right to appeal or contest defendant's sentence in the following limited circumstances: (1) if the sentence is not in accordance with this plea agreement; (2) if the sentence imposed exceeds the maximum statutory penalty; and (3) if the sentence is unconstitutionally defective. This waiver does not, however, prevent defendant from challenging the effectiveness of defendant's attorney after conviction and sentencing. Defendant does not have any complaints at this time about the effectiveness of defendant's attorney. The waivers set out above relate to any issues that now exist or that may arise in the future. Defendant agrees to these waivers in order to cause the government to accept the provisions and stipulations of this plea agreement, to avoid trial, and to have defendant's case finally concluded. Defendant understands that, at the conclusion of the sentencing hearing, the Court will note defendant's appeal rights are limited by this waiver. No assurances or promises have been made by any party as to what defendant's ultimate sentence will be.

ACKNOWLEDGMENT OF DEFENDANT'S UNDERSTANDING

26. _____ Defendant acknowledges defendant has read each of the provisions of this entire plea agreement with the assistance of counsel and understands its provisions. Defendant has discussed the case and defendant's constitutional and other rights with defendant's attorney. Defendant understands that, by entering a plea of guilty, defendant will be giving up the right to plead not guilty; to trial by jury; to confront, cross-examine, and compel the attendance of witnesses; to present evidence in defendant's defense; to remain silent and refuse to be a witness by asserting defendant's privilege against self-incrimination; and to be presumed innocent until proven guilty beyond a reasonable doubt. Defendant agrees defendant's attorney has represented defendant in a competent manner and has no complaints about that lawyer's representation. Defendant states defendant is not now on or under the influence of, any drug, medication, liquor, or other substance, whether prescribed by a physician or not, that would impair defendant's ability to fully understand the terms and conditions of this plea agreement.

Northern District of Iowa Excerpts from Actual Plea Agreements

Federal Defender/CJA Panel Seminar
May 21, 2009

Excerpt "A"

STIPULATION OF FACTS

36. [REDACTED] By initialing each of the following paragraphs, the defendant stipulates to the following facts. He agrees these facts are true and may be used to establish a factual basis for his guilty plea and sentence. He has been advised by his attorney of his rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. He waives these rights and agrees this stipulation may be used against him at any time in any proceeding should he violate or refuse to follow through on this plea agreement, regardless of whether the plea agreement has been accepted by the district court. The defendant agrees that the stipulation below is a summary of the facts against him and does not constitute all of the facts the government would be able to prove at trial and may be able to prove to the court in accordance with this agreement.

A. [REDACTED] Between about 2005 through November 2007, in the Northern District of Iowa and elsewhere, defendant and others reached an agreement or came to an understanding to distribute 500 grams or more of methamphetamine mixture. The defendant voluntarily and intentionally joined the agreement or understanding to distribute methamphetamine, either at the time it was first reached or at some later time while it was still in effect. At the time that the defendant joined in the agreement, he knew that the purpose of the agreement was to distribute methamphetamine.

B. [REDACTED] On or about June 6, 2006, in Fort Dodge, Iowa, defendant intentionally transferred at least 12.99 grams of methamphetamine mixture to an individual cooperating with the government. At the time of the transfer, defendant knew that he was transferring methamphetamine. Defendant distributed this methamphetamine within 1000 feet of the real property constituting a public school, that is Phillips Middle School in Fort Dodge, Iowa.

- C.** On or about June 20, 2006, in Fort Dodge, Iowa, defendant intentionally transferred at least 10.19 grams of methamphetamine mixture to an individual cooperating with the government. At the time of the transfer, defendant knew that he was transferring methamphetamine.
- D.** As part of this conspiracy, on or about November 7, 2007, defendant did employ, hire, use, persuade, induce, entice, or coerce a person under the age of 18 to assist him in the conspiracy to distribute methamphetamine.
- E.** As a part of this conspiracy defendant received a handgun (a .380 semi-automatic handgun from [REDACTED]) while conducting a drug transaction and held the firearm as collateral for one day for \$150 owed on a drug deal.
- F.** In the course of this conspiracy, defendant participated in the distribution of at least 1400 grams of methamphetamine mixture.
- F1.** Defendant obtained 1/2 gram to teener (1.75 grams) quantities of methamphetamine from [REDACTED] of Webster City, Iowa, 5-8 times over two months in early 2006 for personal use.
- F2.** Defendant obtained 1/4 gram to teener (1.75 grams) quantities of methamphetamine from [REDACTED] of Webster City, Iowa, 10 times over two months in early 2006 for personal use.
- F3.** Defendant obtained 1/2 gram to 1 gram quantities of methamphetamine from [REDACTED] of Webster City, Iowa, in early 2006 for personal use.
- F4.** Defendant obtained an 8-ball (3.5 grams) of methamphetamine from [REDACTED] in 2006 for personal use/resale.
- F5.** Defendant obtained 1 gram of methamphetamine from [REDACTED] three times for personal use.
- F6.** Defendant obtained 2-3 grams of methamphetamine from [REDACTED] one time and 1/4 ounce (7 grams) of methamphetamine another time for personal use/resale.
- F7.** Defendant obtained 1/4 to 1/2 ounce of methamphetamine ten times from [REDACTED] through [REDACTED] for personal use/resale. (Minimum total 3 ounces methamphetamine.)

- F8. Defendant received a total of one ounce of methamphetamine from [REDACTED], Iowa, in "teeners" (1.75 grams) increments for personal use/resale.
- F9. Defendant obtained 1/2 ounce of methamphetamine from [REDACTED] of Fort Dodge, Iowa, everyday for one month for personal use/resale. (Minimum total 15 ounces methamphetamine.)
- F10. Defendant obtained "teeners" (1.75 grams) to 1/2 ounces of methamphetamine from [REDACTED] of Fort Dodge, Iowa, 4-5 times for personal use/resale. (Minimum total 19 grams methamphetamine.)
- F11. Defendant obtained 1/4 ounce of methamphetamine one time (on front) [REDACTED] and 1/2 ounce of methamphetamine two other times for personal use/resale. (Minimum total 21 grams methamphetamine.)
- F12. Defendant obtained 1/2 ounce of methamphetamine from [REDACTED] of [REDACTED], Iowa, on two separate occasions for personal use/resale (with [REDACTED] being supplied by [REDACTED]). (Minimum total 1 ounce methamphetamine.)
- F13. Defendant obtained an 8-ball (3.5 grams) of methamphetamine from [REDACTED] of [REDACTED], Iowa, for personal use/resale.
- F14. Defendant obtained 1 ounce of methamphetamine from [REDACTED] three times for personal use/resale.
- F15. Defendant obtained "teeners" (1.75 grams) of methamphetamine from [REDACTED] in 2006 two times and in July/August 2006, defendant "middled" deals between [REDACTED] and [REDACTED] in 1/4-1/2 ounce amounts for a total of 2 ounces for personal use/resale. (Minimum total 60 grams methamphetamine.)
- F16. Defendant obtained 1 ounce of methamphetamine (on fronts) from [REDACTED] of [REDACTED], Iowa, everyday for at least one week in 2006 for personal use/resale. (Minimum total 7 ounces methamphetamine.)
- F17. Defendant obtained 1/4 ounce of methamphetamine for personal use/resale from [REDACTED] 8 times.
- F18. Defendant obtained a total of 1/2 ounce of methamphetamine for personal use/resale from [REDACTED], a/k/a [REDACTED] through [REDACTED] in 8-ball (3.5 gram) increments.

- F19. Defendant obtained a total of 1 ounce of methamphetamine for personal use/resale from [REDACTED] in 8-ball (3.5 gram) increments.
- F20. Defendant obtained 1/4 ounce of methamphetamine from [REDACTED] two times for 1/2 ounce in total.
- F21. Defendant obtained an 8-ball (3.5 gram) of methamphetamine from [REDACTED] three times.
- F22. Defendant obtained 1/4 ounce of methamphetamine for personal use/resale from [REDACTED] ([REDACTED]) in 2006.
- F23. Defendant obtained 1/4 ounce of methamphetamine for personal use/resale from [REDACTED] of Webster City, Iowa, two times.
- F24. Defendant obtained 1/4 ounce of methamphetamine for personal use/resale from [REDACTED] ([REDACTED]) through [REDACTED] LNU.
- F25. Defendant obtained two 8-balls (7 grams) of methamphetamine for personal use/resale from [REDACTED].
- F26. Defendant obtained 1/4 ounce of methamphetamine for personal use/resale from [REDACTED] two times.
- F27. Defendant obtained 1/4 ounce of methamphetamine for personal use/resale from [REDACTED], a/k/a [REDACTED], two times through [REDACTED].
- F28. Defendant obtained 1/4 to 1/2 ounce of methamphetamine for personal use/resale from [REDACTED] 5-10 times. (Minimum total 1/2 ounce methamphetamine.) *10"*
- F29. Defendant obtained 1/2 gram once and a "teener" (1.75 gram) of methamphetamine for personal use/resale from [REDACTED].
- F30. Defendant obtained 1/4 ounce of methamphetamine for personal use/resale from [REDACTED] 2-3 times. (Minimum total 1/2 ounce methamphetamine.)
- F31. Defendant obtained 1/2 ounce of methamphetamine for personal use/resale from [REDACTED] ([REDACTED]) 3-4 times. (Minimum total 1 1/2 ounce methamphetamine.)

Excerpt "B"

11. _____ The parties stipulate and agree that the United States Sentencing Guidelines should be applied as follows

- (1) **Drug Base Offense Level (Chapter 2):** For Count 1, the parties stipulate and agree that pursuant to USSG § 2D1.1, the appropriate base offense level is at least ~~25~~ ³⁰ based upon the defendant's involvement in at least ~~10~~ ⁴⁶ pounds of a mixture or substance containing a detectable amount of methamphetamine and 3 pounds of cocaine. The government is free to present evidence and arguments to support the stipulation and, if warranted, a higher base offense level.
- (2) **Dangerous Weapon (SOC):** ~~The parties stipulate and agree that a two-level upward adjustment is appropriate under USSG § 2D1.1(b)(1) for possession of a firearm during the commission of the offense of conviction.~~ Defendant stipulates and agrees that he possessed a shotgun and pistol at his home where he collected at least one drug debt. ^{MLP}
- (3) **Role in the Offense (Chapter 3):** The parties stipulate and agree that defendant had neither an aggravating or mitigating role in these offenses.
- (4) **Acceptance of Responsibility (Chapter 3 adjustment):** As of the date of this agreement, defendant appears to qualify for a two-level downward adjustment for acceptance of responsibility. However, the government

* The parties reserve for sentencing whether this fact warrant a two level adjustment under USSG § 2D1.1(b)(1) MLP

Excerpt "C"

14. The parties stipulate and agree that the United States Sentencing Guidelines should be applied as follows:

B. Concerning Count 1 of the Information, the parties stipulate and agree that a one-level upward adjustment is appropriate under USSG § 2D1.2(a)(2) for manufacturing and/or distributing controlled substances within 1000 feet of a school as part of the same course of conduct or common scheme or plan as the offense of conviction. Defendant agrees part of the conduct occurred within 1000 feet of the real property comprising of the Okoboji Elementary, Middle and High Schools located in Okoboji, Dickinson County, Iowa.

STIPULATION OF FACTS

C. On _____, 200__, the defendant along with _____ purchased at the Allan Hardware Store in Arnolds Park, Dickinson County, Iowa, a can of Coleman Fuel and denatured alcohol for manufacturing methamphetamine. Allan's Hardware Store is within 1000 feet of the Okoboji Middle School, Okoboji, Dickinson County, Iowa.

**CROSS EXAMINING
SNITCHES**

PRESENTED BY

**ANGELA CAMPBELL,
F. MONTGOMERY BROWN,
CJA ATTORNEYS
DES MOINES, IOWA**

F. Montgomery Brown
Brown & Scott, P.L.C.
hskrfan@brownscott.com

TRIAL ZEN-REDUX

Does your plan survive first contact with the enemy? Do you have a plan?

Vinny Gambini: Is it possible the 2 defendants...

[looks at judge]

Vinny Gambini: went into the Sac-O-Suds, picked 22 specific items off of the shelf, had the clerk take the money, make change, then leave. Then 2 different men, drive up...

[Seeing Mr. Tipton shake his head no]

Vinny Gambini: Don't shake your head I'm not finished yet. Wait until you hear the whole thing you can understand what it is that I'm askin'. Then, two different men drive up in a similar looking car, do into the store, shoot the clerk, rob him, then leave?

Mr. Tipton: No. They didn't have enough time.

Vinny Gambini: Why not? How long was they in the store for?

Mr. Tipton: 5 minutes.

Vinny Gambini: 5 minutes? How do you know? Did you look at your watch?

Mr. Tipton: No.

Vinny Gambini: Oh, oh, oh, you testified earlier that you saw the boys go into the store, and you had just begun to cook your breakfast and you were just getting ready to eat when you heard the shot.

Mr. Tipton: That's right.

Vinny Gambini: So obviously it takes you 5 minutes to cook your breakfast.

Mr. Tipton: That's right.

Vinny Gambini: That's right, so you knew that. You remember what you had?

Mr. Tipton: Eggs and grits.

Vinny Gambini: Eggs and grits. I like grits, too. How do you cook your grits? Do you like them regular, creamy or al dente?

Mr. Tipton: Just regular I guess.

Vinny Gambini: Regular. Instant grits?

Mr. Tipton: No self respectin' Southerner uses instant grits. I take pride in my grits.

Vinny Gambini: So, Mr. Tipton, how could it take you 5 minutes to cook your grits when it takes the entire grit eating world 20 minutes?

Mr. Tipton: I don't know, I'm a fast cook I guess.

Vinny Gambini: I'm sorry I was all the way over here I couldn't hear you did you say you were a fast cook, that's it?

Mr. Tipton: Yeah.

Vinny Gambini: Are we to believe that boiling water soaks into a grit faster in your kitchen than anywhere else on the face of the earth?

Mr. Tipton: I don't know.

Vinny Gambini: Well, I guess the laws of physics cease to exist on top of your stove. Were these magic grits? Did you buy them from the same guy who sold Jack his beanstalk beans?

My Cousin Vinny

The Mental Trial- Visualization, Will & Discipline

Visualization of victory which does not extend beyond common concepts is not absolute perfection.

Sun-Tzu The Art of War

*He either fears his fate too much,
Or his deserts are small,
Who dare not put it to the touch,
To win or lose it all.*

Message from General Montgomery on D-Day

I. The Loop/Box

Theme fact (soaks in) and/or Closing fact (argued in)

The right facts, the ones we really need, are not only passive, they are damned elusive, and we're not going to just sit back and observe them.

Pirsig, Zen and the Art of Motorcycle Maintenance

Leading, short & specific

Attack and be certain of occupation by attacking what they cannot defend.

Sun-Tzu The Art of War

Discipline & difficulty

Achieving victory in every battle is not absolute perfection: neutralizing an adversary's forces without battle is absolute perfection.

Sun-Tzu The Art of War

II. Cross Thoughts

Trust/Don't trust your swing

"Feel my way in" equates to the burglar who has not cased the joint

What do I want v. can achieve & have the will to achieve

[competition] teaches the strong to know when they are weak and the brave to face themselves when they are afraid.

Vince Lombardi

III. The Goal

Create the current and take the witness downriver

So, water conforms to terrain in determining movement, and forces conform to the enemy in determining victory.

Sun-Tzu The Art of War

IV. Navigation of obstacles

By perceiving the enemy and perceiving ourselves, there will be no unforeseen risk in any battle.

Sun-Tzu The Art of War

All scenarios

The Denial

The Narrative

The Dodge

The “can’t remember”

“Obstacle” Loops

Seize victory through pre-arrangements.

Sun-Tzu The Art of War

Cost/benefit

Is the obstacle likely to be viewed unfairly by the jury?

It was a puzzling thing. The truth knocks on the door and you say, ‘Go away, I’m looking for the truth,’ and so it goes away.

Pirsig, Zen and the Art of Motorcycle Maintenance

The tributary dilemma

Fight or flee?

A dilemma which is Greek for “two premises” has been likened to the front end of an angry and charging bull.

Pirsig, Zen and the Art of Motorcycle Maintenance

They consider it a safe haven

Wise to respect their motives

Pursuit inevitably prompts:

“why” or “how”

Results in “Woody Hayes” result

3 of 4 are bad

Turnover

Waste of time

Loss of control/rhythm

Exceptions?

Tributary is a planned loop/box
Then do it when you are ready/on your terms

- 1 A. Yeah.
- 2 Q. In your testimony against Coplen you don't mention Williams;
- 3 right?
- 4 A. Then why ask me about him?
- 5 Q. But they're associated, is what you say now?
- 6 A. Correct. They're cousins, why wouldn't they be associated?
- 7 Q. When did you first meet Williams?
- 8 A. I'm not for sure. It's over ten years ago.
- 9 Q. And you've done some time with him, too, haven't you?
- 10 A. No.
- 11 Q. Were you in the Newton Correctional Facility from March to
- 12 April of 2003?
- 13 A. Yes, I was. When he came back on violation, I did run into
- 14 him, as a matter of fact. Yes, I did.
- 15 Q. You were both there from March to April of 2003. Do you
- 16 remember that?
- 17 A. Yes, I was.
- 18 Q. Is that the right date?
- 19 A. I'm not for sure. I remember him coming back when I was in
- 20 prison, now that you mention it.
- 21 Q. Was it 2003?
- 22 A. Yeah. Before I got out of prison, yes.
- 23 Q. Now, you don't really like Coplen and Williams, do you?
- 24 A. I have no problem with them.
- 25 Q. You don't have any problem with them?

- 1 A. No.
- 2 Q. Never had any problem with them?
- 3 A. No.
- 4 Q. Never been in a fight with them?
- 5 A. No.
- 6 Q. Do you remember a fight at Club Pimpin'?
- 7 A. No.
- 8 Q. You don't remember a fight in 2004 at Club Pimpin'?
- 9 A. No.
- 10 Q. Who is Lorando Williams?
- 11 A. Lorando Williams.
- 12 Q. Who is he?
- 13 A. I know him from Des Moines.
- 14 Q. Are you related to him?
- 15 A. No.
- 16 Q. Is he connected to you in any way?
- 17 A. No.
- 18 Q. Is he a West Side Villain?
- 19 A. No.
- 20 Q. Did you ever go to Club Pimpin' with him?
- 21 A. No.
- 22 Q. So you're saying today in front of the jury that you did not
- 23 get in a fight at Club Pimpin' with Kenyarta Williams and Antwan
- 24 Coplen--
- 25 A. Correct.

- 1 Q. --in 2004?
- 2 A. Correct.
- 3 Q. Didn't happen?
- 4 A. Is there a police report?
- 5 Q. Did it happen?
- 6 A. No.
- 7 Q. You're at the Polk County Main Jail right now?
- 8 A. Correct.
- 9 Q. And you've been there for a little while, haven't you?
- 10 A. A year.
- 11 Q. Pretty familiar with the rules; right?
- 12 A. Correct.
- 13 Q. The rules are you can't fight other inmates; right?
- 14 A. Correct.
- 15 Q. You probably can't fight federal witnesses, either, can you?
- 16 A. I'm not supposed to fight with nobody. Keep your hands and feet to yourself.
- 17 Q. You broke that at least once; right?
- 18 A. Correct.
- 19 Q. There's another jail in town, too; right?
- 20 A. Interim jail.
- 21 Q. They have the same kind of rules; right?
- 22 A. Correct.
- 23 Q. How do you pass information between the two jails?
- 24 A. I don't know.

- 1 Q. Can you write each other?
- 2 A. Can you write?
- 3 Q. Like if you had a friend in the interim jail, could you send him a letter?
- 4 A. You can if you have somebody to send it for you, but you're not supposed to.
- 5 Q. Have you ever done that?
- 6 A. Excuse me?
- 7 Q. Have you ever done that?
- 8 A. Yes.
- 9 Q. You've sent mail across to the other jail?
- 10 A. Yes. I wrote my uncle before.
- 11 Q. Who is your uncle?
- 12 A. Harold.
- 13 Q. Harold what?
- 14 A. Webster.
- 15 Q. Is he the only one?
- 16 A. That I can remember. I wrote my other friend before, OT, too.
- 17 Q. Did you talk about Kenyarta Williams?
- 18 A. I asked him why he was going to trial.
- 19 Q. You asked who? OT?
- 20 A. Yeah, he shouldn't go to trial.
- 21 Q. You're passing information from your jail to the interim jail?

- 1 A. No. I asking why he went to trial. I wasn't passing
 2 information about the case.
 3 Q. I believe what you said was, and tell me if this is
 4 correct--
 5 A. If it was in the letter, it's correct.
 6 Q. --"Hurk goes to trial on December 3. I'll be right there
 7 front and center. Nigga better act like he know what it is."
 8 Is that correct?
 9 A. He shouldn't go.
 10 Q. What does that mean?
 11 A. Don't go to trial, you know what it is, you bought drugs off
 12 of me, I'll come to testify.
 13 Q. What else did you put in that letter?
 14 A. I'm not for sure. They asked him did he want to testify
 15 against him, I guess, but he said he never dealt with him.
 16 Q. Did you talk about how--did you say if someone is going to
 17 go out like that, they should have had them working for you to
 18 work some time off?
 19 A. Excuse me?
 20 Q. Did you say, "If your brother was going to go out like that,
 21 you should have had him working for you"--
 22 A. That was a joke. I was talking about his little brother.
 23 He got caught selling some fake drugs. It was a joke.
 24 Q. So it's just a joke about who was cooperating against who?
 25 A. No. No. No. His little brother was 18 years old. He

- 1 was out there selling some fake drugs. He got caught selling
 2 some fake drugs. It's a joke.
 3 Q. Who is C-Low?
 4 A. His name is Calvin Nelson.
 5 Q. Who is it that?
 6 A. He's a member of the West Side Villains.
 7 Q. What's "bogus" mean?
 8 A. What do you mean?
 9 Q. What's the word "bogus" mean?
 10 A. Because Onterio Taylor was supposed to testify against him.
 11 Q. And bogus means you're going to say something fake?
 12 A. No. Bogus is "Why you going to testify again?"
 13 Q. So what does the sentence "Your bogus for C-Low. I told my
 14 dad. He fell out laughing"?
 15 A. I told my dad. My dad didn't think it was right what we was
 16 doing to C-Low.
 17 Q. Why was your dad laughing, then?
 18 A. Because he didn't think it was right.
 19 Q. So it was funny if it was not right?
 20 A. Yeah, because we all grew up together.
 21 Q. Who is Marion Harris?
 22 A. He's my cousin.
 23 Q. Did you testify against him?
 24 A. He's my cousin. No.
 25 Q. You wouldn't testify against your cousin, would you?

- 1 A. No.
- 2 Q. Didn't you tell the Government you would tell them anything
- 3 you know about anybody?
- 4 A. Me and Marion never had dealings.
- 5 Q. Did he come and see you after he got off of his charges?
- 6 A. Yes, he did. He's on my visiting list.
- 7 Q. How drunk was he?
- 8 A. I'm going to say he wasn't drunk. I'm going to say he was
- 9 high.
- 10 Q. He came into the jail high to visit you?
- 11 A. Yeah.
- 12 Q. Did you tell the Government that?
- 13 A. Probably. I'm not for sure.
- 14 Q. Who would you have told?
- 15 A. Probably my dad.
- 16 Q. Okay. But did you tell someone--
- 17 A. As a matter of fact, I put it in the letter that you're
- 18 reading right now.
- 19 Q. To who?
- 20 A. OT.
- 21 Q. But would you tell the Government that information?
- 22 A. Yeah. They asked me if he come to see me. I said yeah, he
- 23 came down here high when he come to see me.
- 24 Q. You didn't send all this information to them; right?
- 25 A. No.

- 1 Q. Did you talk about Antwan in that letter, too?
- 2 A. I don't remember. It's right in front of you. You can read
- 3 it and tell me.
- 4 Q. Did you say "I seen Twan G"--that's Antwan Copen; right?
- 5 A. Yeah.
- 6 Q. "I seen Twan G. We was in the elevator together. I wish he
- 7 would have tried something."
- 8 A. Yeah, because he was talking--he's been talking, and stuff,
- 9 over at the jail, telling about everybody that testify against
- 10 him, he wants to fight everybody. I was in the elevator with
- 11 him. I thought he was going to hit me, but he didn't.
- 12 Q. He didn't ever do anything to you; right?
- 13 A. No. He's been over there shadow boxing a lot.
- 14 Q. So who's Boggie G?
- 15 A. Who?
- 16 Q. B-o-g-g-i-e?
- 17 A. That's my cousin.
- 18 Q. Where does he live?
- 19 A. Minnesota.
- 20 Q. In this letter you're talking about how you're going to try
- 21 to make up where your family lives so you can get stationed up
- 22 in Minnesota?
- 23 A. He's my cousin. Why would I make up something?
- 24 Q. You said, "Boggie G is supposed to send me a letter so I'll
- 25 have an address in Minnesota so I can say my family lives

- 1 there?"
- 2 A. He's my cousin.
- 3 Q. You talked about Smoke in here, too, right?
- 4 A. Probably. I don't know. You've got the letter right there.
- 5 Q. You talk about how Smoke is in Oxford; right? Is that a
- 6 prison?
- 7 A. Correct.
- 8 Q. And you're happy that he won't get any more reductions;
- 9 right?
- 10 A. I don't know.
- 11 Q. You don't remember saying that he won't testify on Wayne, so
- 12 he won't get any more reduction?
- 13 A. That's what I heard, so I put it in the letter.
- 14 Q. "So he'll be stuck with 12 years. Good"?
- 15 A. Basically.
- 16 Q. You got a letter from OT, too, didn't you?
- 17 A. Yeah, I did.
- 18 Q. He's in the other jail; right?
- 19 A. Correct. He's in the interim. He's on the unit with
- 20 Kenyarta.
- 21 Q. So you guys are passing information back and forth, right,
- 22 about Kenyarta?
- 23 A. No.
- 24 Q. Doesn't he write you, "Hurk over here playing the real
- 25 nigger role"? Do you remember that?

- 1 A. No, I don't.
- 2 Q. If I show it to you, would you remember it?
- 3 A. Yes, I would. If you got it, I'll believe it.
- 4 MS. CAMPBELL: Your Honor, may I approach?
- 5 THE COURT: You may.
- 6 BY MS. CAMPBELL:
- 7 Q. Is this the letter that he wrote?
- 8 A. Yeah. Correct.
- 9 Q. And it's addressed to you?
- 10 A. Correct.
- 11 Q. And he says at the bottom here--talking about Hurk; right?
- 12 A. That's correct. Basically what he's saying is he's over
- 13 there trying to play the real nigger role when he tried to
- 14 cooperate at first, but the Government wasn't trying to get him
- 15 to cooperate because he wasn't indicted yet.
- 16 Q. That's how you get information back and forth between the
- 17 jails; right?
- 18 A. We don't get information back and forth.
- 19 Q. I just have two letters. Are there other letters that I
- 20 just didn't happen to come across?
- 21 A. Were there lies in the letter, or something?
- 22 Q. I'm just asking you. I mean, are there more letters?
- 23 A. I didn't see no lies in the letters.
- 24 Q. Are there more letters?
- 25 A. No.

- 1 Q. Never written more letters to the other jail?
- 2 A. Do you have any?
- 3 Q. I don't think I have everything. How did you get a letter
- 4 to OT?
- 5 A. I wrote it through his girlfriend.
- 6 Q. Who is his girlfriend?
- 7 A. I don't know her name. I got her name on my unit, but I
- 8 don't know it by heart.
- 9 Q. What you do is skirt the rules of the jail by writing a
- 10 letter to someone else?
- 11 A. Correct.
- 12 Q. Then they send it into the other jail?
- 13 A. It's called third party.
- 14 Q. You're not supposed to do that; right?
- 15 A. Everybody does it.
- 16 Q. But you're not supposed to?
- 17 A. No, you're not.
- 18 Q. You're not supposed to pass information about people,
- 19 either, are you?
- 20 A. I don't pass information about anybody.
- 21 Q. You're not supposed to pass information, are you?
- 22 A. I don't.
- 23 Q. How do you talk between the floors at the Polk County Main
- 24 Jail?
- 25 A. What do you mean?

- 1 Q. How does one person on one floor talk to someone on the
- 2 floor below them?
- 3 A. I guess there's something like you can pump the toilet out,
- 4 take the water out the toilet, and talk through it.
- 5 Q. Does that work?
- 6 A. I don't know. I never did it.
- 7 Q. You never did it, you just heard about it?
- 8 A. I just heard about it. I seen people do it, but I never did
- 9 it.
- 10 Q. Is everyone in the main jail aware of how that works?
- 11 A. Yes.
- 12 Q. It's pretty common knowledge?
- 13 A. Yes, it is.
- 14 Q. Have you ever testified about Williams before?
- 15 A. No, I haven't.
- 16 Q. So you didn't testify in his Grand Jury?
- 17 A. No, I didn't.
- 18 Q. Who all have you testified against?
- 19 A. Copen and Williams.
- 20 Q. Anybody else go to trial that you know of that you haven't
- 21 testified against?
- 22 A. Excuse me?
- 23 Q. Do you know anybody else who's been to trial out of the jail
- 24 that you haven't cooperated against?
- 25 A. No.

- 1 Q. So the two guys that went to trial, you happen to know
2 information about?
- 3 A. I had dealings with them.
- 4 Q. Just so we're clear, your testimony is--
- 5 A. Truthful.
- 6 Q. Of course. But your testimony is that you have never been
7 in a fight with Kenyarta Williams or Antwan Copleen?
- 8 A. Correct.
- 9 Q. Never?
- 10 A. Never.
- 11 MS. CAMPBELL: I don't have any more questions.
- 12 THE COURT: Any redirect?
- 13 REDIRECT EXAMINATION
- 14 BY MS. SCORPINITI:
- 15 Q. You didn't testify in the Fuller trial this past summer, did
16 you?
- 17 A. No, I didn't. I was supposed to.
- 18 Q. And when Harris went to trial, that was before you--
- 19 A. Got indicted.
- 20 Q. That was before you entered a cooperation agreement?
- 21 A. Correct.
- 22 Q. And Mr. Copleen at this time has already been sentenced and
23 is currently in segregation; is that right?
- 24 A. Correct. He's over there threatening a lot of people.
- 25 Q. That's why he's in segregation?

- 1 A. Correct.
- 2 Q. I want to clarify a date with you, a year, actually. On
3 direct examination you were referring to these two transactions
4 as occurring in the several months prior to your arrest June 6,
5 '06, which placed it in the 2006 year. But in cross-examination
6 you were saying 2005.
- 7 A. I had dealings with him in 2005.
- 8 Q. So it was 2005?
- 9 A. Correct.
- 10 Q. So it was a little over a year before your arrest?
- 11 A. Yes. I was on pretrial. He was still in jail.
- 12 MS. SCORPINITI: No further questions.
- 13 THE COURT: Any recross?
- 14 MS. CAMPBELL: I don't think so, Your Honor.
- 15 THE COURT: You may step down.
16 (Witness excused.)
- 17 THE COURT: You want to stretch? It might be a minute
18 before we see our next witness.
19 What's the name of your next witness?
20 MS. SCORPINITI: Craig Hunt. Craig Hunt.
21 THE CLERK: Raise your right hand, please.
22 CRAIG DUDLEY HUNT, GOVERNMENT'S WITNESS, SWORN
23 THE CLERK: Thank you. Please take the stand.
24
25

- 1 Q. Okay. So if someone had come in and testified that you were
2 middle-manning crack deals, that wouldn't be true?
- 3 A. No.
- 4 Q. You never gave anybody any crack ever?
- 5 A. I may have gave some at one time, but it wasn't something I
6 made a habit of. What I got arrested for was powder cocaine.
- 7 Q. I'm not talking about what you were arrested for. Did you
8 sell crack?
- 9 A. No.
- 10 Q. Never?
- 11 A. I may have once or twice in my life.
- 12 Q. You just can't remember?
- 13 A. Right, I can't remember specifically.
- 14 Q. You wouldn't really want to admit that, right, because you
15 didn't tell the Government about that, did you?
- 16 A. Yes, I did.
- 17 Q. You told them you sold crack?
- 18 A. I tried to tell them everything I did.
- 19 Q. Okay. But now you're telling me you don't remember selling
20 crack, so either you remembered and you told them, or you don't
21 remember and didn't tell them, or you didn't do it. Which one
22 is it?
- 23 A. I probably told them--I'd have to go back and look in the
24 paperwork.
- 25 Q. You just don't remember?

- 1 A. No.
- 2 Q. You don't really want to get wrapped up in the crack
3 business, right, because--I'm sure you know this--because you've
4 got 46 months of jail? It's much better if you just get caught
5 with powder cocaine; right?
- 6 A. Yes.
- 7 Q. I mean, your sentence is a lot less with powder cocaine than
8 with crack cocaine?
- 9 A. I believe the guidelines are that way, yes.
- 10 Q. And you pled guilty only to powder cocaine; right?
- 11 A. That's correct.
- 12 Q. I was looking at your plea agreement. How much powder
13 cocaine do you think you sold your whole life?
- 14 A. Two to five kilos--
- 15 Q. Two to five kilos?
- 16 A. --I believe is what the plea agreement was for.
- 17 Q. I'm not asking you what the plea agreement says, I'm asking
18 you what actually happened. How much total cocaine do you think
19 you sold?
- 20 A. I never kept track of it. I think two to five kilos is
21 probably fairly accurate.
- 22 Q. I'm looking at your plea agreement, and you signed a
23 stipulation of facts, right, on the back of it? Do you remember
24 that?
- 25 A. No, I don't. I don't.

1 Q. If I showed it to you, would you remember it better?

2 A. It would help. Please.

3 MS. CAMPBELL: Your Honor, may I approach?

4 THE COURT: Yes.

5 MS. CAMPBELL: I'll go ahead and mark this

6 Government's--or Defendant's Exhibit A.

7 BY MS. CAMPBELL:

8 Q. I'm handing you what's been marked as Defendant's Exhibit A.

9 A. You're referring to the last page, ma'am?

10 Q. Yes. Is that your plea agreement?

11 A. Yes.

12 Q. And you signed it?

13 A. Uh-huh.

14 Q. You'll have to answer "yes" or "no" for the record.

15 A. Yes, ma'am.

16 Q. What you signed on there was what the facts were; right?

17 A. Right.

18 Q. And did you cross off something in the statement of facts?

19 A. The attorney changed it.

20 Q. And you signed it?

21 A. I initialed that change, yes.

22 Q. So you were able to change what the facts were in the plea

23 agreement; right?

24 A. I wasn't. The attorney did.

25 Q. And you signed it?

1 A. Right.

2 Q. And your attorney did it for you?

3 A. Right.

4 Q. And what was that change?

5 A. From 3 1/2 to 5 kilos, down to 2.0 kilograms to five

6 kilograms.

7 MS. CAMPBELL: We offer Defendant's Exhibit A.

8 MS. SCORPINITI: No objection.

9 THE COURT: Received.

10 (Defendant's Exhibit A was offered

11 and received in evidence.)

12 BY MS. CAMPBELL:

13 Q. You're able to negotiate with the Government what the facts

14 are in the plea agreement; right?

15 A. Yes, ma'am.

16 Q. And whose name was in there as the person you were using to

17 sell cocaine?

18 A. Lee Baccam.

19 Q. Lee Baccam?

20 A. Uh-huh.

21 Q. Is that the only one?

22 A. I didn't read all of it, the plea agreement, but I believe

23 Lee Baccam, yes.

24 Q. I looked through it. I didn't see Kenyarta Williams' name

25 in there; right?

- 1 A. No. No.
- 2 Q. You just told us Hurk, Coplen, Ray Small, Ray Stevens?
- 3 A. Yes.
- 4 Q. None of those are in there; right?
- 5 A. No.
- 6 Q. Just Baccam?
- 7 A. Right.
- 8 Q. Now, you told us that you have never gotten a reduction of
- 9 your sentence for cooperating; right?
- 10 A. Yes, ma'am.
- 11 Q. That wouldn't be entirely true; right? You didn't get
- 12 substantial assistance; right? You didn't get a substantial
- 13 assistance motion; right?
- 14 A. No, ma'am, I didn't.
- 15 Q. I'm pretty well versed in federal law. You figured out--you
- 16 were charged with a statute where you had to get a mandatory
- 17 minimum of five years?
- 18 A. Right.
- 19 Q. That would be 60 months?
- 20 A. I got 46 months.
- 21 Q. How did you get from 60 to 46 months?
- 22 A. My attorney told me that I got something called a safety
- 23 valve, and I took responsibility for my crime, and that that
- 24 lowered the offense level down and put it at 46 to 57 months on
- 25 the guidelines.

- 1 Q. Okay. Do you know what the safety valve is?
- 2 A. Kind of. I think it was because I'd never been in trouble
- 3 before, and that sort of thing.
- 4 Q. Okay. One of the requirements of the safety valve is that
- 5 you have to have proffered everything you know to the
- 6 Government; right?
- 7 A. Uh-huh.
- 8 Q. Yes? Is that correct?
- 9 A. I don't know all the terms.
- 10 Q. You did that; right?
- 11 A. Yes.
- 12 Q. So doing that got you below the five-year mandatory minimum?
- 13 A. Right.
- 14 Q. So you did get a reduction for cooperating with the
- 15 Government?
- 16 A. Yeah.
- 17 Q. Right?
- 18 A. Yeah, in one sense I did.
- 19 Q. And you didn't get any enhancements for anything you did
- 20 with crack; right?
- 21 A. No, ma'am.
- 22 Q. You've never been sentenced on anything with crack at all?
- 23 A. No, ma'am.
- 24 Q. Because that would drastically increase your sentence,
- 25 wouldn't it?

- 1 A. Probably, yes.
- 2 Q. You got a pretty good deal? You were smoking crack; right?
- 3 A. Right.
- 4 Q. And you may or may not be selling and distributing crack,
- 5 I'm still not clear, but you're doing something else with crack;
- 6 right?
- 7 A. Uh-huh. Yes.
- 8 Q. And you never got sentenced for anything with crack; right?
- 9 A. Right.
- 10 Q. And you got 46 months?
- 11 A. Correct, ma'am.
- 12 Q. We were talking about the safety valve. You were
- 13 interviewed, I believe, on May 12th of 2006?
- 14 A. That's correct.
- 15 Q. And were you out of custody at that time?
- 16 A. Yes, I was.
- 17 Q. And you promised to tell the truth in that proffer; right?
- 18 A. Yes, ma'am.
- 19 Q. And kind of a lot rode on that; right? Because you were
- 20 trying to get a reduction from the 60 months; right?
- 21 A. I guess, yes.
- 22 Q. So you wanted to tell everything to the Government that you
- 23 knew?
- 24 A. That's correct.
- 25 Q. And you sat down in a room with the agents?

- 1 A. That's correct.
- 2 Q. And they asked you a bunch of questions?
- 3 A. Yes.
- 4 Q. One of the questions they asked was "Where are you getting
- 5 your crack," right?
- 6 A. I can't remember the exact questions they asked me, but I
- 7 tried to answer every question that they asked me.
- 8 Q. I mean, they're DEA agents; correct?
- 9 A. That's correct.
- 10 Q. They're going to ask you about where you're getting your
- 11 drugs?
- 12 A. They asked me about certain--if I remember correctly, they
- 13 asked me about certain individuals, they asked me about this
- 14 person, that person, this person, that person, but--that's all I
- 15 remember about it.
- 16 Q. Okay.
- 17 A. And I tried to answer all the questions, and we talked for
- 18 two or three hours.
- 19 Q. I've read that. You told them you started using crack in
- 20 2002; right?
- 21 A. No. I used it before then.
- 22 Q. But you told them 2002?
- 23 A. No. If I did, it was a misunderstanding, but I'd used it
- 24 longer than that.
- 25 Q. And you said during that interview that you got your crack

- 1 from a Linda Cutler?
- 2 A. Yes, that was one of the people.
- 3 Q. Right. And that you had bought from Cutler approximately
- 4 100 times; right?
- 5 A. Yes, ma'am.
- 6 Q. That's probably an estimate, though?
- 7 A. Right.
- 8 Q. You don't know exactly how many times?
- 9 A. No, I wouldn't.
- 10 Q. And you said you worked as a middleman for Cutler?
- 11 A. Uh-huh.
- 12 Q. Right?
- 13 A. That's correct.
- 14 Q. And as a middleman, as what you explained, you were
- 15 brokering deals; right?
- 16 A. Right.
- 17 Q. With cocaine and crack?
- 18 A. Right.
- 19 Q. Okay. So you were selling crack back then; right?
- 20 A. Yeah. As a middleman, yes.
- 21 Q. Okay. Now you remember that you were selling crack?
- 22 A. With Linda Cutler, yes.
- 23 Q. Then you talked about Raymond Small?
- 24 A. Right.
- 25 Q. And Lee Baccam?

- 1 A. Right.
- 2 Q. And Brian Murray?
- 3 A. Right.
- 4 Q. And William Gray?
- 5 A. Right.
- 6 Q. And Mike the rat?
- 7 A. Right.
- 8 Q. And David Coleman?
- 9 A. Right.
- 10 Q. He's your partner; right?
- 11 A. Yes.
- 12 Q. And you told them you worked with Craig Hunt?
- 13 A. Right.
- 14 Q. And you worked with Antwan Coplen and Scott Roth?
- 15 A. Right.
- 16 Q. And you talked about what prices you bought things for;
- 17 right?
- 18 A. Right.
- 19 Q. And what you sold for?
- 20 A. Right.
- 21 Q. You talked about the drug histories of everyone involved;
- 22 right?
- 23 A. Right.
- 24 Q. And you were asked specifically about Antwan Coplen; right?
- 25 A. Right.

- 1 Q. You said you bought small amounts of crack from him; right?
- 2 A. Right.
- 3 Q. And then you were asked about Kenny Williams?
- 4 A. I don't remember being asked about Kenny Williams.
- 5 Q. Do you remember talking about Kenny Williams at all?
- 6 A. No, ma'am, I don't.
- 7 Q. In that first proffer you never mentioned him at all?
- 8 A. No, ma'am, not that I remember. I don't remember.
- 9 Q. On May 12th of 2006 when you're supposed to tell the truth
- 10 about everything so you can get rid of your five-year mandatory
- 11 minimum, you don't mention Kenyarta Williams?
- 12 A. They never asked. They never brought his name up.
- 13 Q. They brought up everybody else you worked with, right, and
- 14 you had to bring up names, didn't you?
- 15 A. Basically they controlled the interview.
- 16 Q. They already knew about Cutler and Baccam and Murray and
- 17 Gray and Mike and David and Craig and Antwan? They knew
- 18 everything? You didn't mention any names?
- 19 A. I can't remember how--I think I had spoke with one of the
- 20 agents a couple days prior to that and we had went down through
- 21 a list of names of people, and then when I met with the agents,
- 22 they went down through it with me.
- 23 Q. And at no time does it cross your mind to tell them, "I was
- 24 buying crack cocaine twice a week for five months from someone
- 25 else that you haven't talked about"? It didn't cross your mind

- 1 to bring that up?
- 2 A. No, it didn't.
- 3 Q. All right. So after that point you went and got sentenced,
- 4 right, on the safety valve?
- 5 A. Correct.
- 6 Q. And you didn't get any substantial assistance because they
- 7 didn't use any of your information?
- 8 A. That's correct.
- 9 Q. So you got sent away to federal prison; right?
- 10 A. Correct.
- 11 Q. They still haven't talked about Kenyarta Williams yet;
- 12 right?
- 13 A. No, ma'am.
- 14 Q. They bring you back to testify; right?
- 15 A. That's correct.
- 16 Q. How do they know to bring you back if you haven't said
- 17 anything about him yet? I mean, really, you've gone through
- 18 everyone you ever sold crack to and cocaine to, and they bring
- 19 you back from federal prison to testify against someone you
- 20 never mentioned. How did that happen?
- 21 A. I believe someone--a witness to it may have involved my name
- 22 in it.
- 23 Q. So someone else said that you bought from Williams; right?
- 24 A. Right.
- 25 Q. Who is that?

- 1 A. Craig Hunt.
- 2 Q. Okay. So you get back from jail and you find out Craig Hunt
- 3 has implicated you in this transaction with Mr. Williams?
- 4 A. Uh-huh. That's correct.
- 5 Q. And what are you going to do? What are you going to do?
- 6 Either say he's lying, or go along with the story; right?
- 7 A. I'm going to tell the truth.
- 8 Q. Oh, this time you're going to tell the truth?
- 9 A. That's right.
- 10 Q. The second proffer you're going to all of a sudden remember
- 11 you bought crack--
- 12 A. I never--
- 13 Q. --a hundred times from Mr. Williams?
- 14 A. I never said a hundred times.
- 15 Q. How many times?
- 16 A. Maybe 30 or 40.
- 17 Q. Thirty or forty. Never mentioned it before?
- 18 A. No, ma'am.
- 19 Q. How did you know that Craig Hunt talked about you?
- 20 A. Because he had been in the office when I was buying drugs.
- 21 Q. But how did you know he told the Government?
- 22 A. I just assumed that, I guess.
- 23 Q. No one ever told you, no one ever told you he testified? I
- 24 mean, you said it pretty sure; right?
- 25 A. Yeah.

- 1 Q. Has he testified in this court yet, in this trial?
- 2 A. I beg your pardon?
- 3 Q. Has he testified yet in this trial, do you know?
- 4 A. Ask the question again, ma'am.
- 5 Q. Has Craig Hunt testified?
- 6 A. I believe so, yes.
- 7 Q. How do you know that?
- 8 A. We came over together yesterday.
- 9 Q. Oh, you rode over together, didn't you? What did you talk
- 10 about?
- 11 A. Everything; the weather, mutual friends, the family.
- 12 Q. Did you talk about crack?
- 13 A. No.
- 14 Q. Talk about your stories?
- 15 A. No.
- 16 Q. You didn't talk about the trial at all?
- 17 A. No, ma'am.
- 18 Q. You haven't seen Craig Hunt for how long? A year?
- 19 A. Oh, no. I seen him in June.
- 20 Q. Oh, you see him at the jail?
- 21 A. I seen him in June at another hearing.
- 22 Q. In June. When is the first time you tell the agents that
- 23 you bought crack from Mr. Williams?
- 24 A. I believe June of this year when they asked me.
- 25 Q. I'm looking at it as being last week. You're saying there's

- 1 another proffer in June of this year?
- 2 A. I believe I met with him the last week of June prior to
- 3 Antwan Coplen's trial, and I believe that Debra asked me that,
- 4 yes. I believe she asked me that then in June.
- 5 Q. Well, you just told me you went to federal prison without
- 6 having ever told them that; is that not true?
- 7 A. That's true.
- 8 Q. That is true. So you went to federal prison having never
- 9 talked about Williams; right?
- 10 A. Right.
- 11 Q. And then you came back and you were in the Polk County Jail?
- 12 A. Correct.
- 13 Q. Which one? Interim or main?
- 14 A. Interim.
- 15 Q. Interim jail?
- 16 A. Yeah.
- 17 Q. And suddenly you start talking about Williams; is that
- 18 right?
- 19 A. No.
- 20 Q. Now, let's get these details down. When was the first time
- 21 you met Williams?
- 22 A. I couldn't say exactly. Sometime in 2000.
- 23 Q. Okay. And you started buying crack from him when?
- 24 A. In the middle of '05.
- 25 Q. Middle of '05?

1 MS. CAMPBELL: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MS. CAMPBELL:

- 4 Q. Ms. Logan, you'd agree with me that you have a problem with
- 5 honesty; right?
- 6 A. What?
- 7 Q. You'd agree with me you have a problem with honesty?
- 8 A. No, I wouldn't.
- 9 Q. Well, you were convicted of perjury in 2004?
- 10 A. That's the perjury charge I'm talking about.
- 11 Q. And you went in a court and pled guilty to that; right?
- 12 A. Yes. I pled guilty because they threatened me with habitual
- 13 criminal, and I didn't know exactly all--me and my sister's
- 14 records are all mixed together, so I couldn't tell them
- 15 everything of what was my felonies when they asked me.
- 16 Q. So you went in a court--just so we know what perjury is, you
- 17 went in court like you are today?
- 18 A. That is correct.
- 19 Q. You took an oath?
- 20 A. That is correct.
- 21 Q. Like you did today?
- 22 A. That is correct.
- 23 Q. And then you lied?
- 24 A. I didn't lie, I just didn't remember.
- 25 Q. Isn't that what perjury is?

- 1 A. That is what perjury is, that is correct.
- 2 Q. You were found guilty of perjury?
- 3 A. I pleaded guilty to perjury, that is correct.
- 4 Q. You admitted to the Court that you were guilty of lying in
- 5 court?
- 6 A. I'm not going to say that because I didn't know all--I
- 7 didn't exactly remember all the dates of my felony convictions
- 8 when they asked me. I was found guilty for perjury. But not
- 9 only that, my sister's records were also in with mine so they
- 10 couldn't determine it either.
- 11 Q. Let's go back to the date you were in to plead guilty.
- 12 A. Go ahead.
- 13 Q. Were you in court?
- 14 A. Yes, I was.
- 15 Q. Did the Judge tell you what a perjury charge was?
- 16 A. Did the Judge--yes, they told me what a perjury charge was.
- 17 Q. Part of the perjury charge means that you intentionally lied
- 18 under oath?
- 19 A. No, I didn't intentionally lie.
- 20 Q. Isn't that what part of perjury is?
- 21 A. That's part of what perjury is, but I didn't lie.
- 22 Q. The Judge told you that; right?
- 23 A. Yes, the Judge told me that's what perjury was when I
- 24 pleaded guilty.
- 25 Q. You agreed to that?

- 1 A. I agreed to that because I couldn't remember all the dates
- 2 to when--my last felony, so what was I supposed to do? Me and
- 3 my sister's records is run together. I can't determine which is
- 4 which. That's left up to them, it's not left up to me.
- 5 Q. Now what you're telling us when you went into court and pled
- 6 to perjury is you weren't really guilty, so you lied to the
- 7 Judge then; is that what you're saying?
- 8 A. No, that's not what I'm saying.
- 9 Q. I know some of these might be wrong, it's the first time I
- 10 ever heard this, but I'm looking at your record and I have a
- 11 series of thefts, right?
- 12 A. Correct.
- 13 Q. April of 2000, stole from Wal-Mart?
- 14 A. That is correct.
- 15 Q. And you were convicted of theft on that?
- 16 A. All those theft charges was ran together.
- 17 Q. But this one from Wal-Mart, it was a separate count; right?
- 18 A. A separate account.
- 19 Q. And then in May of 2000 you went in and stole from Kohl's;
- 20 right?
- 21 A. Okay. May of 2000?
- 22 Q. Yeah.
- 23 A. Go back to 2002 you said?
- 24 Q. No. April of 2000?
- 25 A. April 2000 for Wal-Mart?

- 1 Q. Yeah.
- 2 A. Okay.
- 3 Q. Convicted; right?
- 4 A. Convicted.
- 5 Q. May of 2000 you stole from Kohl's?
- 6 A. That is correct.
- 7 Q. Convicted; right?
- 8 A. All those was ran together.
- 9 Q. But you were convicted of stealing from Kohl's?
- 10 A. That is correct.
- 11 Q. It was a different day you went in?
- 12 A. It was a different day, but it was all the charges ran together as one.
- 13
- 14 Q. Then you went in on July 3rd of 2000 and stole from
- 15 Gordman's; correct?
- 16 A. Correct.
- 17 Q. And you were convicted?
- 18 A. Correct.
- 19 Q. And then July 19th of 2000 you went in and stole from Von
- 20 Maur; right?
- 21 A. Correct.
- 22 Q. And you were convicted?
- 23 A. Correct.
- 24 Q. And then August of 2000 you stole from Dahl's?
- 25 A. Correct.

- 1 Q. And were convicted?
- 2 A. Correct.
- 3 Q. So that's five--
- 4 A. But those charges was still pending. All of them was ran together when I got convicted for Dahl's. In that charge--all the charges was ran together.
- 5
- 6
- 7 Q. Right. They gave you a deal. They let you run them
- 8 altogether?
- 9 A. Correct.
- 10 Q. But you stole on different days?
- 11 A. That is correct.
- 12 Q. All within five months?
- 13 A. That is correct.
- 14 Q. All right. Let's go over now what you just testified about
- 15 Williams. I believe you said you witnessed Sheniqua McDowell
- 16 buy crack from him in 2003?
- 17 A. That is correct.
- 18 Q. How many times?
- 19 A. Twice, maybe three times.
- 20 Q. And can you give me--was it the beginning of 2003? End of
- 21 2003? Middle of 2003?
- 22 A. It was like around the summer--the end of 2003. Between the
- 23 summer and fall of 2003.
- 24 Q. Summer/fall 2003?
- 25 A. I'm not exactly sure on what the dates were.

- 1 Q. Can you give me a beginning and end? Was it before April,
2 or are you for sure it's after April?
- 3 A. It's after April because I started working at Access Direct
4 after April.
- 5 Q. Okay. After May?
- 6 A. I'm not exactly sure of the dates. I don't remember the
7 dates.
- 8 Q. So it could be May. What's our end frame there? You said
9 summer to fall. August? September?
- 10 A. No. This went from 2003 all the way to 2004. I'm not
11 exactly sure of the dates.
- 12 Q. Okay. But around in the summer of 2003 you went with
13 Sheniqua McDowell?
- 14 A. That is correct.
- 15 Q. And watched her buy crack?
- 16 A. That is correct.
- 17 Q. What car were you in?
- 18 A. What car was we in then?
- 19 Q. Uh-huh.
- 20 A. 2003 we was in a gray '97 Dodge.
- 21 Q. And you went in and you got crack from him; right?
- 22 A. Yes, that is correct.
- 23 Q. And you took the crack away--or Sheniqua took the crack
24 away; is that correct?
- 25 A. That is correct.

- 1 Q. This is all 2003 I'm talking about?
- 2 A. That is correct.
- 3 Q. You left with the crack?
- 4 A. That is correct.
- 5 Q. What I'm confused about is how did you get through security
6 at the prison?
- 7 A. How did I get through security at the prison?
- 8 Q. Right.
- 9 A. In 2003 I was not in prison.
- 10 Q. I know, but he was. How did you get through security?
- 11 A. We didn't go to the prison. This was Oakridge. I can't
12 remember exactly what the date was.
- 13 Q. You said it was in 2003?
- 14 A. It was in 2003 when I met him.
- 15 Q. Positive, absolutely positive, summer/fall 2003, bought
16 crack from him, not in prison?
- 17 A. Not in prison. Like I said before, I'm not exactly sure
18 what the date was, but it was 2003.
- 19 Q. Okay. Let's move on to 2004. That's when you started
20 buying, right?
- 21 A. Right.
- 22 Q. But Billie wasn't involved in any of those; right?
- 23 A. In 2004? No, it was just Sheniqua.
- 24 Q. Okay. Just you and Sheniqua?
- 25 A. Haygood wasn't involved in--

- 1 Q. When did it start in 2004?
- 2 A. I moved to--it was in the wintertime. I moved to the south
- 3 side in 2004. I can't remember exactly what day it was.
- 4 Q. When you say "winter," do you mean January, or do you mean
- 5 December? Do you mean the beginning of 2004?
- 6 A. No.
- 7 Q. You mean the end of 2004?
- 8 A. The end of 2004.
- 9 Q. After the transactions in summer/fall 2003, you wait a year,
- 10 until 2004?
- 11 A. Because I was dealing with somebody else at the time. From
- 12 the time I got it--from then I was dealing with somebody else,
- 13 it's just that person didn't show up.
- 14 Q. The next time is November/December 2004, that's the next
- 15 transaction?
- 16 A. Right.
- 17 Q. Okay. You're saying one time you went with Haygood?
- 18 A. And this was--yes.
- 19 Q. What date was that?
- 20 A. I'm not exactly sure of the day.
- 21 Q. What month is that?
- 22 A. This is after my conviction in 2005--I mean after--
- 23 Q. After your arrest?
- 24 A. Yes, in 2005.
- 25 Q. 2005. When was your arrest?

- 1 A. August. It was shortly after that. I'm not exactly sure of
- 2 the date.
- 3 Q. So shortly after your arrest?
- 4 A. It was, like, five or six months after that.
- 5 Q. Okay. When were you arrested?
- 6 A. August.
- 7 Q. And it was a few months after that?
- 8 A. Yes, because Billie went to treatment and came back. I'm
- 9 not exactly sure on the dates.
- 10 Q. Okay. And so are we talking--Billie was already out of
- 11 treatment?
- 12 A. Yes.
- 13 Q. What car did you go in?
- 14 A. My burgundy--it was a burgundy Cadillac.
- 15 Q. Who was with you?
- 16 A. Sheniqua McDowell.
- 17 Q. Who else?
- 18 A. Billie Haygood.
- 19 Q. And just once you went with Billie?
- 20 A. That's correct.
- 21 Q. Okay. Where did you start out?
- 22 A. We started out at her apartment.
- 23 Q. Whose?
- 24 A. Billie's apartment on Fleur.
- 25 Q. Was Sheniqua already there?

- 1 A. They were both already there.
- 2 Q. So you were the last one there?
- 3 A. Yes.
- 4 Q. And you picked them all up?
- 5 A. That's correct.
- 6 Q. And you were driving?
- 7 A. Sheniqua drove after I drove over there; yes, that is correct.
- 8
- 9 Q. So Sheniqua drove?
- 10 A. After I drove over there.
- 11 Q. Which seat were you in?
- 12 A. I was in the passenger's seat.
- 13 Q. And where was Billie?
- 14 A. Billie is in the back seat.
- 15 Q. What were you wearing?
- 16 A. I don't remember what I was wearing.
- 17 Q. What was Billie wearing?
- 18 A. I don't remember what she was wearing.
- 19 Q. What was Sheniqua wearing?
- 20 A. I don't remember what they were wearing. I was--I don't remember what they were wearing.
- 21
- 22 Q. You're out of custody; right?
- 23 A. Yes.
- 24 Q. Both of you were released on supervised release?
- 25 A. That is correct.

- 1 Q. Did you hang out every day?
- 2 A. No, we didn't hang out every day. Occasionally we did, that is correct.
- 3
- 4 Q. So I want you to just picture it. I'm picturing you're in the passenger seat, Sheniqua's driving, Billie's in the back seat.
- 5
- 6
- 7 A. Uh-huh.
- 8 Q. Was one of them wearing red?
- 9 A. I don't remember what they were wearing. I honestly don't remember what they were wearing.
- 10
- 11 Q. Was any of them wearing sunglasses?
- 12 A. No, we wasn't wearing no sunglasses.
- 13 Q. All right. So you went and met Kenyarta. What was he wearing?
- 14
- 15 A. I don't remember what he was wearing. I wasn't paying any attention to what he was wearing.
- 16
- 17 Q. Was he wearing a hat?
- 18 A. I wasn't paying any attention to what he was wearing.
- 19 Q. Sunglasses?
- 20 A. I wasn't paying any attention to what he was wearing.
- 21 Q. What car was he in?
- 22 A. He was in the white bubble.
- 23 Q. Okay. And so you pulled up. Was he in--where was he? Was he in his car?
- 24
- 25 A. No. We pulled up first. We waited.

- 1 Q. Then he pulled up?
- 2 A. Yeah.
- 3 Q. Where did he park?
- 4 A. I don't remember where he parked.
- 5 Q. Did he park right beside you?
- 6 A. No, he didn't park right beside us.
- 7 Q. A little further away?
- 8 A. He parked--he was behind us. We were in the front lot. He parked in the lot behind us.
- 9 Q. Okay. How did he know to meet you there?
- 10 A. They had called.
- 11 Q. Who called?
- 12 A. Sheniqua.
- 13 Q. Sheniqua called him?
- 14 A. Yes.
- 15 Q. When did she call him?
- 16 A. I'm not exactly sure when she called him. They were ready to go. They were coming out of their building when I drove up.
- 17 Q. They called before you got there?
- 18 A. That was before I got there, that's correct.
- 19 Q. Who went and got the crack from him?
- 20 A. Sheniqua.
- 21 Q. How did she do it?
- 22 A. He came to the window and they made a transaction from the window. We were sitting in the car.

- 1 Q. What was the crack packaged in?
- 2 A. Some wrap--in a sandwich bag.
- 3 Q. What size?
- 4 A. I'm not exactly sure what size. I mean, they cut it off at the tip. I imagine the size of the bag.
- 5 Q. How big? This big? This big? How big?
- 6 (Indicating throughout.)
- 7 A. A quarter of an ounce; that big (indicating).
- 8 Q. The bag had been cut off?
- 9 A. Yeah.
- 10 Q. Okay. No one got out of the car?
- 11 A. No.
- 12 Q. How long did it take?
- 13 A. Probably about 15 minutes. It didn't take that long.
- 14 Q. Where did the crack go after you bought it?
- 15 A. She gave it to Billie.
- 16 Q. Billie held it?
- 17 A. Yes.
- 18 Q. Where did Billie put it?
- 19 A. I'm not--I wasn't paying attention to where she stuffed it at.
- 20 Q. Where did you go then?
- 21 A. We went back to Billie's house.
- 22 Q. What did you do?
- 23 A. We went back there, sit there for a few minutes, and then me

- 1 and Sheniqua left.
- 2 Q. You left with Sheniqua?
- 3 A. That is correct.
- 4 Q. Did you smoke the crack?
- 5 A. No, we did not smoke any crack.
- 6 Q. So Williams walks up to the window. We're in maybe February
7 through April sometime?
- 8 A. I'm not exactly sure what date it was.
- 9 Q. So sometime--was it cold out?
- 10 A. I don't think it was cold out.
- 11 Q. Were you guys wearing coats?
- 12 A. No.
- 13 Q. I thought you said you didn't remember what you were
14 wearing?
- 15 A. I would know whether I was wearing a coat. We wasn't
16 wearing a coat. I don't remember exactly if I had on blue jeans
17 or a sweat shirt.
- 18 Q. Was he wearing a coat?
- 19 A. I'm not exactly sure. I don't know what--I didn't pay
20 attention to what he had on.
- 21 Q. Okay. You signed a proffer agreement; right?
- 22 A. Yes, that is correct.
- 23 Q. And you were interviewed by the officers; right?
- 24 A. That is correct.
- 25 Q. When was your first interview?

- 1 A. I'm not exactly sure of the date.
- 2 Q. What month?
- 3 A. I'd say probably around--I'm not exactly sure. I don't
4 remember. It was around October, November. I'm not exactly
5 sure.
- 6 Q. Of what year?
- 7 A. 2005.
- 8 Q. And during that interview--you'd already done a series of
9 transactions with Williams in 2003 and 2004?
- 10 A. That is correct.
- 11 Q. Why didn't you mention him?
- 12 A. His name never came up.
- 13 Q. You never brought it up?
- 14 A. No, I didn't.
- 15 Q. Okay. And then you went into jail; right?
- 16 A. That is correct.
- 17 Q. Did you do any other proffers, or just that one, before you
18 left for federal prison?
- 19 A. No.
- 20 Q. Just the one?
- 21 A. Yeah. That's correct.
- 22 Q. And then you were brought back here?
- 23 A. That is correct.
- 24 Q. How did they know to bring you back if you hadn't said
25 anything about Williams yet?

- 1 A. I was coming back for something that I'm doing for the
 2 State.
 3 Q. The feds didn't bring you back?
 4 A. I didn't know that at the time, no.
 5 Q. So when you came back from Florida, you didn't know the feds
 6 were going to use you in this case?
 7 A. No, I did not.
 8 Q. You actually had not said anything about Williams yet?
 9 A. That is correct.
 10 Q. When was the first time you told them about Williams?
 11 A. It would have had to have been July.
 12 Q. Of?
 13 A. 2007.
 14 Q. Okay. How did you do that? When you came back here?
 15 A. Yes, when I came back here.
 16 Q. They came in and saw you?
 17 A. No. No one had talked to me.
 18 Q. You called them?
 19 A. Yes.
 20 Q. You got to the Polk County Jail--
 21 A. Yes.
 22 Q. --heard Williams was going to trial; right?
 23 A. Yes.
 24 Q. So you heard Williams was going to trial?
 25 A. That is correct.

- 1 Q. So you called her and said, "Oh, yeah, I forgot to tell you,
 2 I actually bought crack from Williams." Is that how it went?
 3 A. I didn't even speak to her. I just told her I wanted to
 4 talk to them. Then they came and spoke to me.
 5 Q. When did they come and speak with you?
 6 A. About a week or two ago.
 7 Q. So when you talked to them in July, you didn't tell them you
 8 knew anything about Williams?
 9 A. I didn't tell them exactly what I wanted to talk to them
 10 about, no.
 11 Q. So not until a week ago did they know you had any
 12 information about Williams?
 13 A. They knew in July when I left a message on the phone.
 14 Q. So you left a message about Williams?
 15 A. Yes.
 16 Q. Is Billie still over at the main jail?
 17 A. Yes, she's still over at the main jail.
 18 Q. Are you still in the same pod together?
 19 A. Yeah, we're still in the same pod together.
 20 Q. She the one who told you Williams was going to trial?
 21 A. No, she's not the one who told me Williams was going to
 22 trial.
 23 Q. You guys discuss it?
 24 A. No, we haven't discussed it. I was told not to discuss it.
 25 Q. You haven't talked to Billie about it?

- 1 A. No, I haven't talked to her about it.
- 2 Q. Who did you talk to about it?
- 3 A. I talked to a couple people that was coming in--that was
- 4 going to the prison when I was coming in, and that was--I can't
- 5 remember her name. Yes, they told me.
- 6 Q. And they told you Kenyarta Williams is in custody, going to
- 7 trial?
- 8 A. I knew Kenyarta was in custody and going to trial, before I
- 9 went to prison I knew.
- 10 Q. Well, it wasn't until you came back that you thought, "Oh,
- 11 maybe I'll"--
- 12 A. I knew before I went to prison that he was in custody and
- 13 going to trial because he was already at another penitentiary
- 14 and they was bringing him back for this. I already knew that.
- 15 Q. Everyone knew that; right?
- 16 A. Everybody knew that.
- 17 Q. Everybody in the jail knew everything about everybody, don't
- 18 they?
- 19 A. No, they don't.
- 20 Q. They know quite a bit, though. What else do you talk about
- 21 besides other people there?
- 22 A. We talk about other things that was happening at home,
- 23 things that we're going to do when we get out. We don't just
- 24 focus on talking about testifying against other people.
- 25 Q. But you can talk about that?

- 1 A. No. It's not nobody's business what I do.
- 2 Q. So nobody at the jail talks about testifying against other
- 3 people?
- 4 A. I mean, I heard other people talk about it, yes.
- 5 Q. You said you got 156 months?
- 6 A. That is correct.
- 7 Q. Did you get a substantial assistance motion to get to 156
- 8 months?
- 9 A. Did I get a substantial assistance motion? No.
- 10 Q. So you didn't get one the first time around?
- 11 A. No.
- 12 Q. Even though you already proffered and told them everything
- 13 you knew?
- 14 A. Yeah, but what I told them, it didn't help, so, no.
- 15 Q. It only helps if they use it; right?
- 16 A. I guess. I guess that's the way it works.
- 17 Q. Who did you tell them about?
- 18 A. Haygood. Just Haygood and a few other people that I was
- 19 working with, but they didn't--I mean, nothing happened.
- 20 Q. Did you talk about Smoke?
- 21 A. We talked about Smoke.
- 22 Q. Did you talk about Hill?
- 23 A. Hill?
- 24 Q. Corneilus Hill?
- 25 A. Corneilus Hill? I don't know Corneilus Hill.

- 1 Q. Craig Hunt?
- 2 A. I don't know--I know Craig Hunt, but, no, we did not talk
- 3 about him.
- 4 Q. So you just talked about Haygood and Smoke?
- 5 A. And there was other people that was in on our indictment. I
- 6 don't remember exactly all the names. Mark Gaddy--just people
- 7 on the indictment with us.
- 8 Q. But Haygood pled guilty; right?
- 9 A. Yeah.
- 10 Q. And Smoke pled guilty; right?
- 11 A. Yeah.
- 12 Q. And they both cooperated; right?
- 13 A. Yeah.
- 14 Q. So your information about them was no good to them; right?
- 15 A. I don't know.
- 16 Q. You didn't get a reduction for it, did you?
- 17 A. No.
- 18 Q. This is your only chance to get a reduction?
- 19 A. No.
- 20 Q. Do you have other chances?
- 21 A. I have--do I have other chances? Yeah, I have other
- 22 chances.
- 23 Q. I mean, you're trying to work off your time, if you can,
- 24 right? Because 156 months is a lot of time. I mean, you want
- 25 to work it down, don't you?

- 1 A. Oh, yeah.
- 2 Q. How did you get caught?
- 3 A. How did I get caught?
- 4 Q. Yes.
- 5 A. Through tape-recorded conversation on Smoke's phone.
- 6 Q. So they tapped Smoke's phone?
- 7 A. Uh-huh.
- 8 Q. And they recorded you on it?
- 9 A. That is correct.
- 10 Q. Buying crack?
- 11 A. That is correct.
- 12 Q. They did a search warrant at your daughter's house; didn't
- 13 they?
- 14 A. That is correct.
- 15 Q. Now, you're saying you met Kenyarta Williams working with
- 16 him at Access Direct?
- 17 A. That is correct.
- 18 Q. When was that?
- 19 A. I started working at Access Direct April the 1st and April
- 20 29th of 2002.
- 21 Q. And when did he start working there?
- 22 A. He was there when I got there.
- 23 Q. How long did he work there?
- 24 A. I'm not exactly sure how long. He wasn't there that long
- 25 after I got there, but I'm not exactly sure how long it was.

- 1 Q. So he stopped working there in 2002?
- 2 A. Yes.
- 3 Q. Did you see him again after that?
- 4 A. Yes, I did.
- 5 Q. Besides doing the crack?
- 6 A. Yes, I did.
- 7 Q. I've been hearing about this going-away party that you had.
- 8 A. Yeah.
- 9 Q. Did you have a going-away party?
- 10 A. Yes, I did.
- 11 Q. What were you going away for?
- 12 A. I was coming to prison.
- 13 Q. So you had a party before you came into prison?
- 14 A. Yes, I did.
- 15 Q. It was a big party?
- 16 A. Yes.
- 17 Q. A lot of people there?
- 18 A. Yes.
- 19 Q. Kenyarta's sister was there?
- 20 A. That is correct.
- 21 Q. And you know her; right?
- 22 A. That is correct.
- 23 Q. And she introduced you to Kenyarta at that party, didn't she?
- 24 she?
- 25 A. She introduced me to who?

- 1 Q. Kenyarta.
- 2 A. No.
- 3 Q. Isn't that the first time you ever met him?
- 4 A. No.
- 5 Q. First time you ever talked to him; right?
- 6 A. No.
- 7 Q. When was that party?
- 8 A. It was in 2005--wait a minute. 2006. It was in 2006.
- 9 Q. Now, every time you've been in the Polk County Jail, you've been in with Billie Haygood; right?
- 10 been in with Billie Haygood; right?
- 11 A. No, not every time.
- 12 Q. When you went in 2006 you were?
- 13 A. Yes.
- 14 Q. And this time you are?
- 15 A. Yes.
- 16 Q. But sometimes they move you around?
- 17 A. That is correct.
- 18 Q. What's Billie drive?
- 19 A. What does she drive? She was driving a Cadillac, and then the last car she drive, I'm not exactly sure what it was.
- 20 the last car she drive, I'm not exactly sure what it was.
- 21 Q. She's had a bunch of cars; right?
- 22 A. Yes.
- 23 Q. Really nice cars?
- 24 A. Yes.
- 25 Q. She has a lot of money?

- 1 A. I don't know.
- 2 Q. She's buying really nice cars, at least?
- 3 A. Yes.
- 4 Q. How many?
- 5 A. I'm not exactly sure. Two or three.
- 6 Q. We've been hearing some talk about how you talk to people in
7 the jail through the toilets. Are you familiar with how that
8 works?
- 9 A. I've seen people talking through the toilet, yes, I have.
- 10 Q. And how do they do that?
- 11 A. I'm not exactly sure how they pump it out because I'm not
12 talking in the toilet, I'm not sticking my face where someone
13 put their behind.
- 14 Q. But everyone in the jail knows how it works?
- 15 A. Yes.
- 16 Q. I just want to be clear on you said Kenyarta Williams was
17 working at Access Direct when you started working there?
- 18 A. Yes.
- 19 Q. In April of 2002?
- 20 A. April of 2002, that's correct.
- 21 Q. And you're positive?
- 22 A. He was working there--I'm not exactly sure what the date
23 was, but, yeah, he was working there.
- 24 Q. You've never testified in court against Williams yet, have
25 you?

- 1 A. Against who?
- 2 Q. Kenyarta Williams?
- 3 A. No.
- 4 Q. You didn't testify at the Grand Jury?
- 5 A. No.
- 6 MS. CAMPBELL: I don't have any more questions, Your
7 Honor.
- 8 THE COURT: Any redirect?
- 9 REDIRECT EXAMINATION
- 10 BY MS. SCORPINITI:
- 11 Q. What's the name of Mr. Williams' sister that you referred
12 to?
- 13 A. Kenyana Williams.
- 14 Q. Does she go by Yana?
- 15 A. That's correct.
- 16 Q. Have you known her a long time?
- 17 A. I know her since I started working at Access Direct in
18 2002, that is correct.
- 19 Q. Did you ever buy dope from her?
- 20 A. Yes, I did.
- 21 MS. CAMPBELL: Objection, Your Honor. Outside the
22 scope of cross-examination and relevance.
- 23 THE COURT: Overruled.
- 24 A. Yes, I did.
- 25

- 1 A. I'm not sure. I've never dealt with the federal system, so
 2 I'm not sure.
- 3 Q. Did you hear them talk about the presumption of detention of
 4 people charged with drug crimes?
 5 A. No.
 6 Q. You don't remember any of that?
 7 A. No.
 8 Q. Okay. But they let you out; right?
 9 A. Uh-huh.
 10 Q. The Court gave you a bunch of rules; right?
 11 A. Yes.
 12 Q. The Judge sat there and told you all the rules; right?
 13 A. Yes.
 14 Q. Do you remember which judge it was?
 15 A. No.
 16 Q. And one of those rules was don't do drugs; right?
 17 A. Yes.
 18 Q. Don't buy drugs?
 19 A. Yes.
 20 Q. I don't know if he went so far as to tell you not to sell
 21 drugs. Did he?
 22 A. I'm not sure.
 23 Q. That was just sort of a given rule?
 24 A. Yes.
 25 Q. No more selling drugs.

- 1 And so you got out when? In June of '05?
 2 A. I got out August 18th.
 3 Q. August 18th. And how long before you started smoking weed?
 4 A. Probably a week.
 5 Q. How long until you started selling crack?
 6 A. Probably two weeks.
 7 Q. Okay. And then you got in trouble for that; right?
 8 A. Yes.
 9 Q. They found out about it in November?
 10 A. Yes.
 11 Q. So you did it for about a month before they found out about
 12 it; right?
 13 A. Yeah.
 14 Q. It takes a little while to get the urinalysis samples back;
 15 right?
 16 A. Uh-huh.
 17 Q. So then you went in again, and what did the Judge do? Did
 18 he make you stay in prison?
 19 A. I went in, I think it was the beginning of December, and I
 20 waited 45 days in Polk County Jail, and I went to in-patient
 21 treatment, and got out in February.
 22 Q. Okay. So you were in treatment from December of '05 to
 23 February 8th of '06?
 24 A. No. Actually I didn't go to treatment until January. It
 25 was a 28-day program. I was in Polk County for 45 days, and

- 1 then I went to treatment, and then I got out of treatment
 2 February 8th.
 3 Q. You had to admit that you were using drugs to the Court in
 4 order to get into that treatment program; right?
 5 A. Yeah. Well, the UAs told the story, so...
 6 Q. Did you tell them that you were selling crack, then?
 7 A. No.
 8 Q. So then you get out again on February 8th, 2006. How long
 9 until you start using marijuana again?
 10 A. I didn't.
 11 Q. How long until you start buying crack again?
 12 A. I didn't.
 13 Q. How long until you start selling crack again?
 14 A. I didn't.
 15 Q. If Elnora Logan came in here and told us that she was with
 16 you when you bought crack after you got out of treatment, that
 17 would be false?
 18 A. That was before I got out of treatment.
 19 Q. It wasn't after?
 20 A. No.
 21 Q. When was it that she was with you?
 22 A. It was probably about the month of November. It was before
 23 I went to treatment. Me and Sheniqua were coming out of my
 24 house, we were going to jump in my car to go meet him at
 25 Oakridge, and she pulled up. We jumped in the car with her and

- 1 she took us.
 2 Q. That was in November?
 3 A. Yeah, about the month of November.
 4 Q. Of '05?
 5 A. Uh-huh.
 6 Q. If she said it was in the springtime of '06, she just must
 7 have been mistaken?
 8 A. Yeah, she was.
 9 Q. So you went into drug treatment. Who paid for that?
 10 A. Who paid for that?
 11 Q. Who paid for the treatment?
 12 A. I'm not sure.
 13 Q. Not you?
 14 A. No.
 15 Q. Okay. And then the Court lets you out again; right?
 16 A. Uh-huh.
 17 Q. Okay. Why did you go back in the next time?
 18 A. Because I took my plea, my plea agreement.
 19 Q. When did you start buying from Devon?
 20 A. Actually it wasn't me. It was somebody else.
 21 Q. So when you said you bought from your friend, Devon, and you
 22 told the police that, was that wrong?
 23 A. Yeah. It wasn't me.
 24 Q. Who was it?
 25 A. It was my husband.

- 1 for a three-month period in the summer of 2005?
- 2 A. Okay. Yeah.
- 3 Q. You do remember that?
- 4 A. But I don't remember saying the summer.
- 5 Q. You just remember telling them that you bought from him?
- 6 A. Uh-huh.
- 7 Q. Okay. So if you had said the summer, that would be false?
- 8 A. The summer of 2005? I don't know. I'm not sure.
- 9 Q. Well, you just told us that you did your transactions from
- 10 October to December 2005.
- 11 A. Yeah, because I didn't buy from him in the summer because
- 12 Smoke was around in the summer.
- 13 Q. So you didn't buy from Williams--
- 14 A. No.
- 15 Q. --at all when Smoke was around?
- 16 A. No.
- 17 Q. Never?
- 18 A. No.
- 19 Q. So your first transaction was in October of 2005?
- 20 A. Uh-huh.
- 21 Q. It was at the beginning of October?
- 22 A. I'm not sure if the beginning or the end.
- 23 Q. How many times in the month of October did you buy from him?
- 24 A. Probably once a week, maybe twice.
- 25 Q. Okay. And how many times total did you buy from him?

- 1 A. I don't know.
- 2 Q. Give me a range.
- 3 A. I have no idea of a range.
- 4 Q. Are we talking twice? Are we talking 30 times?
- 5 A. I have no idea.
- 6 Q. You don't know how many times you bought crack from him?
- 7 A. No. I didn't count.
- 8 Q. Okay. It was more than one?
- 9 A. Uh-huh.
- 10 Q. You just said it was once a week.
- 11 A. Uh-huh.
- 12 Q. That would only be relevant if it was more than two weeks.
- 13 So it was at least three times?
- 14 A. Yeah, somewhere in there. I'm not sure. I didn't actually
- 15 count every time I went to go meet him.
- 16 Q. I mean, there's a pretty big deal between two times and
- 17 thirty times; right?
- 18 A. It wasn't two, and it wasn't thirty.
- 19 Q. Somewhere between two and thirty. Was it--you got to give
- 20 me a range. Ten?
- 21 A. Yeah, we'll say 10 to 15.
- 22 Q. Ten to fifteen times, okay. Starting in October, ending in
- 23 December; right?
- 24 A. Uh-huh.
- 25 Q. And once a week. That would be all through the month of

HAYGOOD - CROSS

331

- 1 Q. October?
- 2 A. I would say about eight times.
- 3 Q. Eight times. Okay.
- 4 Q. And do you remember how many of those times were in
5 October?
- 6 A. No.
- 7 Q. Can you remember Halloween? Do you remember Halloween in
8 2005?
- 9 A. Uh-huh.
- 10 Q. Did you buy before then?
- 11 A. Yeah.
- 12 Q. How long before then?
- 13 A. I'm not sure.
- 14 Q. One week? Two weeks?
- 15 A. Two weeks, then.
- 16 Q. Two weeks before Halloween, so October 15th. I'm not
17 convinced you're positive. How sure are you that it's about
18 October 15th?
- 19 A. Actually it may have been the beginning of October because
20 it was October-November. So I would say it was the beginning of
21 October.
- 22 Q. The first time?
- 23 A. Uh-huh.
- 24 Q. Okay. So, like, the 5th, would that be? And then once a
25 week from there; right?

HAYGOOD - CROSS

332

- 1 A. Uh-huh. Yeah.
- 2 Q. All through the month of October?
- 3 A. Yeah.
- 4 Q. Once you started buying from him, it was once a week--
- 5 A. Yeah.
- 6 Q. --right?
- 7 Q. How did you get through the Polk County Jail security?
- 8 A. What do you mean?
- 9 Q. Well, he was in the Polk County Jail in October of 2005.
- 10 Q. How did you get through security?
- 11 A. I don't know.
- 12 Q. You didn't sell to him, did you, at the jail?
- 13 A. No.
- 14 Q. Okay. You want to change your statement now?
- 15 A. I don't know. It was in October. It could have been the
16 end. I know it was--I started in October and November.
- 17 Q. What color is your Crown Victoria?
- 18 A. Gray.
- 19 Q. Elnora said that you were driving a burgundy car. Would
20 that be false?
- 21 A. I did two years ago.
- 22 Q. Okay. When she rode--
- 23 A. She drove a burgundy car.
- 24 Q. She drove a burgundy car? You didn't drive a burgundy car?
- 25 A. No. Two years ago.

- 1 Q. Okay. Let's talk about these details. How many times did
2 Elnora Logan go with you?
3 A. Once.
4 Q. Which time? In the middle? In the beginning? In the end?
5 A. The end.
6 Q. Okay. November? December?
7 A. November.
8 Q. Okay. We've already covered the dates because she thinks
9 it's in the spring. Who was driving?
10 A. She was.
11 Q. Her car?
12 A. (No audible response.)
13 THE COURT: You have to speak up. Don't nod.
14 A. She was driving.
15 BY MS. CAMPBELL:
16 Q. So she pulled up and picked you up. Anybody else with you?
17 A. My sister was.
18 Q. Sheniqua?
19 A. Uh-huh.
20 Q. Where does she pick you up at?
21 A. In front of my apartment building.
22 Q. Which one of you jumps in the back seat?
23 A. Me.
24 Q. You? Where does Sheniqua go?
25 A. The front seat.

- 1 Q. Passenger seat?
2 A. Passenger, yup.
3 Q. So Sheniqua is in the passenger seat, and Elnora's driving;
4 right?
5 A. Yes.
6 Q. And you're in the back seat?
7 A. Yes.
8 Q. If Elnora Logan just came in and told us that Sheniqua was
9 driving that car, would that be false?
10 A. Yeah. I remember we pulled up--we were walking out, Elnora
11 pulled up, we jumped in the car, and she drove off.
12 Q. Sheniqua didn't jump in the driver's seat and drive?
13 A. I don't think so.
14 Q. Where did you go?
15 A. Oakridge.
16 Q. All right. You pulled into Oakridge. Where did you park?
17 A. Just right there in the middle of the parking lot.
18 Q. Okay. Was Williams already there?
19 A. No, I don't think so.
20 Q. Okay. When did he come?
21 A. Maybe five, ten minutes later.
22 Q. Where did he park?
23 A. Right next to us.
24 Q. Right next to you? Parking spot next to you?
25 A. Yeah. It's just a little-bitty parking lot. He just pulled

- 1 right up.
- 2 Q. If Elnora came in here and told us he parked in a different
- 3 lot, behind the lot you were in, that would be false?
- 4 A. Yeah.
- 5 Q. What kind of car was Williams driving?
- 6 A. I think the white one. I'm not sure. I didn't really pay
- 7 attention that day. I'm not sure.
- 8 Q. What were you wearing?
- 9 A. I have no idea.
- 10 Q. What was he wearing?
- 11 A. I don't know.
- 12 Q. You don't remember?
- 13 A. No.
- 14 Q. How was the crack packaged?
- 15 A. How was it what?
- 16 Q. Packaged?
- 17 A. In a baggie.
- 18 Q. What kind of baggie?
- 19 A. Just a regular baggie you make sandwiches.
- 20 Q. Was it a Ziploc or a regular?
- 21 A. Regular.
- 22 Q. Was it cut off at all?
- 23 A. I don't remember.
- 24 Q. You don't remember if the top was cut off?
- 25 A. No.

- 1 Q. What happened to the baggie?
- 2 A. What?
- 3 Q. I mean, how did you get it?
- 4 A. What do you mean?
- 5 Q. Did he--did you go to the car?
- 6 A. He came up to the passenger side where Sheniqua was at.
- 7 Q. He came up to the passenger side where Sheniqua was at, gave
- 8 her the crack?
- 9 A. Uh-huh. Yeah.
- 10 Q. And she handed it to you?
- 11 A. Yeah. After we pulled out, yeah.
- 12 Q. Elnora Logan ever have it?
- 13 A. Not that I know of, no.
- 14 Q. If she's testified that the baggie was cut off on the top,
- 15 how would she have known that if she never had that?
- 16 A. I don't know. It could have been. She could have seen it.
- 17 Q. Okay. Where did you go after that?
- 18 A. I don't know.
- 19 Q. Well, whose house did you go to?
- 20 A. I don't know if we went straight to my house or not. I
- 21 don't know what we did that day.
- 22 Q. You don't remember?
- 23 A. Huh-uh.
- 24 Q. Why was Sheniqua in town then?
- 25 A. What do you mean why was she in town?

- 1 Q. I mean, she didn't live in Des Moines all the time?
- 2 A. Yeah.
- 3 Q. I thought she moved out of town?
- 4 A. She moved to Minneapolis for about a month or two, came back
- 5 here.
- 6 Q. Why did she come back?
- 7 A. I don't know.
- 8 Q. Wasn't it because you had some medical problems?
- 9 A. I don't know if that's why she came back. She came back
- 10 while I was sick, and then she left and came back.
- 11 Q. Did she help you with your kids?
- 12 A. No. My kids weren't with me.
- 13 Q. Did you get into an argument?
- 14 A. With her?
- 15 Q. Yes.
- 16 A. We argue all the time. We're sisters.
- 17 Q. Yeah. She turned you in, didn't she?
- 18 A. No, she didn't turn me in. Turn me in when?
- 19 Q. To the police?
- 20 A. No.
- 21 Q. She didn't turn you in? She wasn't the one who called the
- 22 police and turned you in?
- 23 A. No.
- 24 Q. Did she get rid of all your furniture?
- 25 A. Yes, she sold all my furniture when I went to treatment.

- 1 Q. Did you get mad at that?
- 2 A. Yeah.
- 3 Q. So then after she does that is the first time you go and
- 4 talk to the officers about her; right?
- 5 A. About her?
- 6 Q. Right, about handling these drug transactions for you?
- 7 A. Yeah. I talked to them after that, yeah.
- 8 Q. Right, because it was on February 22nd of 2006; right?
- 9 A. Uh-huh.
- 10 Q. Actually you had talked to the officers before that, at your
- 11 arrest; right?
- 12 A. Uh-huh.
- 13 Q. And that was in August of 2006; right?
- 14 A. Yeah.
- 15 Q. And you gave them a lot of names; right?
- 16 A. Uh-huh.
- 17 Q. You told them about Smoke; right?
- 18 A. Yeah.
- 19 Q. You told them about Paula Hanson; right?
- 20 A. Yeah. Them were smokers.
- 21 Q. And Duane Carroll and Karlos Goldman; right?
- 22 A. Yeah. Them were people I was selling to.
- 23 Q. And Troy; right?
- 24 A. Yes.
- 25 Q. You said you sold to some of your aunts and uncles; right?

- 1 A. Uh-huh.
- 2 Q. You talked about Derek Ellis; right?
- 3 A. Yes.
- 4 Q. And Big Homey?
- 5 A. Yeah.
- 6 Q. And Rainbow; right?
- 7 A. Uh-huh.
- 8 Q. And his wife, Janice?
- 9 A. Uh-huh.
- 10 Q. And they're the people that rock up your crack for you; right?
- 11 A. Just Bow rocked it up. Only one person.
- 12 Q. And they asked you about Elnora Logan; right?
- 13 A. Yeah.
- 14 Q. But you said you never had any dealings with her; right?
- 15 A. Didn't have any dealings with her?
- 16 Q. You never bought any crack from her?
- 17 A. No, I never bought no crack from her.
- 18 Q. And then they asked who else have you bought crack from, and you said Cisco Burton; right?
- 19 A. Yeah.
- 20 Q. And rat Mike and Damon and Tory; right?
- 21 A. Uh-huh.
- 22 Q. And then you said the last person you got crack from was Babob?

- 1 A. Huh?
- 2 Q. B-a-b-o-b, Babob; right?
- 3 A. Yeah.
- 4 Q. Is that all true?
- 5 A. That's when I gave the statement in August; right?
- 6 Q. Yeah.
- 7 A. The majority, yeah.
- 8 Q. Majority? What part is not true?
- 9 A. It's all true.
- 10 Q. You never mentioned your sister then, did you?
- 11 A. I never mentioned who?
- 12 Q. Your sister, Sheniqua?
- 13 A. Why would I mention her?
- 14 Q. You never talked about her being involved in crack; right?
- 15 A. No. Why would I mention her?
- 16 Q. You get out of jail, the first thing you do is you call your sister to go get crack; right?
- 17 A. Yeah, when I got out--yeah, when--she knew I needed help anyway, yeah.
- 18 Q. She knew you needed some crack?
- 19 A. No. She knew where to get some. I told her I needed some, and she had some ideas, yeah.
- 20 Q. But you never used her before to get crack?
- 21 A. No. I didn't have to. No.
- 22 Q. You're friends with Elnora Logan; right?

- 1 A. Yeah.
- 2 Q. Are you still friends with your sister?
- 3 A. Yeah.
- 4 Q. I've looked through your jail record. She doesn't bring you
- 5 any money.
- 6 A. She probably ain't got no money.
- 7 Q. She still visit you?
- 8 A. No.
- 9 Q. When was the last time she came to visit you?
- 10 A. She hasn't visited me.
- 11 Q. When was the last time you called her?
- 12 A. I have no idea where she is even at, if she even has a
- 13 phone, or if she even has a residence. The last thing I heard
- 14 about her she was out smoking crack in a crack house.
- 15 Q. You haven't talked to her in the last year?
- 16 A. Actually--let me see. I talked to her while I was at Pekin,
- 17 Illinois, which would have been January.
- 18 Q. That was the last time?
- 19 A. Uh-huh.
- 20 Q. Of this year?
- 21 A. Yeah.
- 22 Q. You and Elnora Logan in the same cell at the Polk County
- 23 Jail?
- 24 A. No. Same cell?
- 25 Q. I mean same pod?

- 1 A. Yeah, we're on the same floor.
- 2 Q. And you were back in 2006, too; right?
- 3 A. Yeah.
- 4 Q. Is this the first time you've testified against
- 5 Mr. Williams?
- 6 A. Uh-huh.
- 7 Q. Did you ever testify in the Grand Jury?
- 8 A. No.
- 9 MS. CAMPBELL: I don't have any more questions, Your
- 10 Honor.
- 11 THE COURT: Any redirect?
- 12 MS. SCORPINIITI: No, Your Honor.
- 13 THE COURT: You may step down.
- 14 (Witness excused.)
- 15 THE COURT: Call your next witness.
- 16 MS. SCORPINIITI: The United States calls Anthony
- 17 Lawrence.
- 18 THE COURT: You want to stretch?
- 19 THE CLERK: Sir, please raise your right hand.
- 20 ANTHONY LAWRENCE, GOVERNMENT'S WITNESS, SWORN
- 21 THE CLERK: Thank you. Please take the stand.
- 22 THE COURT: Sit over here.
- 23 DIRECT EXAMINATION
- 24 BY MS. SCORPINIITI:
- 25 Q. Please state your full name and spell your last.

**BOP ISSUES:
DESIGNATIONS UNDER
§3621
AND
2ND CHANCE ACT**

PRESENTED BY

**MARY A. NOLAND,
LAURA MASON,
FEDERAL BOP
KANSAS CITY, KANSAS**

Federal Bureau of Prisons

Overview of Classification and Programs

**Laura A. Mason, Regional
Correctional Programs
Administrator, NCRO**

**Mary A. Noland, Senior
Consolidated Litigation Center
Attorney, NCRO**

BOP ORGANIZATION

HARLEY G. LAPPIN, Director

MICHAEL K. NALLEY, Regional Director

- Central Office located in Washington, D.C.
- Six Regional Offices
 - ▶ Northeast (Philadelphia, PA)
 - ▶ Mid-Atlantic (Annapolis Junction, MD)
 - ▶ Southeast (Atlanta, GA)
 - ▶ South Central (Dallas, TX)
 - ▶ Western (Stockton, CA)
 - ▶ North Central (Kansas City, KS)

Topics for Discussion

Designation Process

Institution & Inmate Classification

Judicial Recommendations

Inmate Programs

Designation and Sentence Computation Center

(DSCC)

Effective **January 9, 2006**, the DSCC assumed responsibility for all Initial Designations and redesignations (transfers) from the North Central Region, except ADX Florence and USP Marion cases, as well as those inmates requiring a medical assignment.

By **May 1, 2006**, the DSCC had assumed designation and redesignation responsibilities from all regions of the Bureau of Prisons

Effective **December 11, 2006**, the DSCC assumed the Community Corrections Manager responsibilities for all districts.

DSCC

Delbert G. Sauers, Branch Chief
Louis Milusnic, Section Chief, Designations and Classifications
972-352-4449

Designation & Sentence Computation Center
U.S. Armed Forces Reserve Complex
346 Marine Forces Drive
Grand Prairie, TX 75051

Initial Designation Process

Sentencing

USM Request
Designation

CCM or DSCC Reviews PSI, J&C, & Other
Available Information and Enters Security
Information Into SENTRY

Designation Completed By DSCC or Medical
Designator

USM Notifies Offender
of Designation

USM Moves Offender
to BOP Custody

Institution & Inmate Classification

Institution

Minimum

Low

Medium (Males)

High

Inmate

Minimum

Low

Medium (Males)

High

Perimeter Security

Inmate Housing

Gun Towers

Mobile Patrols

Detection Devices

Internal Security

Inmate-to-Staff Ratio

Severity of Offense

Criminal History Points

History of Violence

History of Escapes

Type of Detainer

Age

Education Level

Drug/Alcohol Abuse History

Voluntary Surrender Status

PUBLIC SAFETY FACTORS

- Disruptive Group
- Greatest Severity Offense
- Sex Offender
- Threat to Government Official
- Deportable Alien
- Sentence Length
- Violent Behavior
- Serious Escape
- Prison Disturbance
- Telephone Abuse
- Juvenile Violence

Summary of Designation Process

In summary, the initial assignment (designation) of an inmate to a particular institution is based primarily upon:

- The level of security and supervision the inmate requires;
- The level of security and staff supervision the institution is able to provide; and,
- The inmate's program needs.

Additional factors that are also considered when designating an inmate to a particular institution include, but are not limited to:

- **The inmate's release residence;**
- **The level of overcrowding at an institution;**
- ★ **Any security, location or program recommendation made by the sentencing court;**
- **Any Central Inmate Monitoring issues;**
- **Any additional security measures to ensure the protection of victims/witnesses and the public in general; and,**
- **Any other factor(s) which may involve the inmate's confinement; the protection of society; and/or the safe and orderly management of a BOP facility.**

Security Level	Custody Level	Male	Female
MINIMUM	COMMUNITY and OUT	0-11 points	0-15 points
LOW	OUT and IN	12-15 points	16-30 points
MEDIUM	OUT and IN	16-23 points	*
HIGH	IN and MAXIMUM	24+ points	31+ points
ADMINISTRATIVE	All custody levels	All point totals	All point totals

Primary Reasons For Not Following A Judicial Recommendation

Security

Safety

Program Needs

Population Management

Tips For Effective Recommendations

When Possible, Give General Location Recommendations

Prioritize Your Recommendations

Medical/Mental Health Recommendations - When Possible, Do Not Recommend A Particular Institution

If You Have Questions Prior To Sentencing - Please Call either North Central Regional Office or the DSCC

MEDICAL CLASSIFICATION SYSTEM

■ Philosophy of Classification System

Prisons are not always built with access to community medical resources in mind. Many federal prisons are in remote rural locations with limited numbers of specialists and small community hospitals. Inmates have a much higher prevalence of chronic medical and mental health conditions than the general population. The goal of this classification system is to match inmate health care needs (particularly in terms of intensity of care issues, access to community medical resources, and functional criteria) to institutions which can meet those needs.

Medical Classification

Care Level Criteria

Care 1

Inmates are generally healthy but may have limited medical that can be easily managed by every 6 month clinician evaluations. Needed subspecialty care is limited (not regularly required and completed in < 3 months).

Inmates with mental health conditions are stable and require chronic care appointments and/or individual psychology or health services contacts no more frequently than every 6 months. If more acute services are required, such as crisis intervention, such episodes are short-lived (i.e., less than 3 months duration, and occur no more frequently than every 2 years) and resolve without the need

Care 2

Inmates are stable outpatients that have chronic illnesses that require at least quarterly clinician evaluations and are independent in ADLs.

Inmates with mental health conditions can be managed through chronic care clinics and/or individual psychology or health services contacts no more frequently than monthly to quarterly. If more acute services are required, such as crisis intervention, such episodes are short-lived (i.e., less than 3 months duration, and occur no more frequently than every 2 years) and resolve without the need for hospitalization.

Care 3

Inmates are fragile outpatients with conditions that require frequent clinical contacts (daily to monthly). Inmates with chronic or recurrent mental illnesses or ongoing cognitive impairments which require frequent (daily to monthly) psychiatric/health services and/or psychology contacts to maintain outpatient status. Inmates may require assistance in performing some ADLs, but do not require daily nursing care. Such assistance may include the regular services of inmate companions. Stabilization of the inmate's medical or mental health condition may periodically require hospitalization.

Care 4

Inmate requires services available at MRC and may require daily nursing care.

Mental health conditions are acute or chronic and have resulted in severe impairment of functioning. Current symptomology or treatment require 24 hour skilled nursing care or nursing assistance.

Medical Referral Centers

- * Rochester, Minnesota - medical & mental health
- * Springfield, Missouri - medical & mental health
- * Devens, Massachusetts - medical & mental health
- * Lexington, Kentucky - medical
- * FMC Butner, North Carolina - medical & mental health
- * Carswell AFB, Ft. Worth, Texas - medical & mental health (female)

North Central Region

Institutions by Care Level

Care 1

FCl Sandstone, Minnesota

FPC Yankton, South Dakota

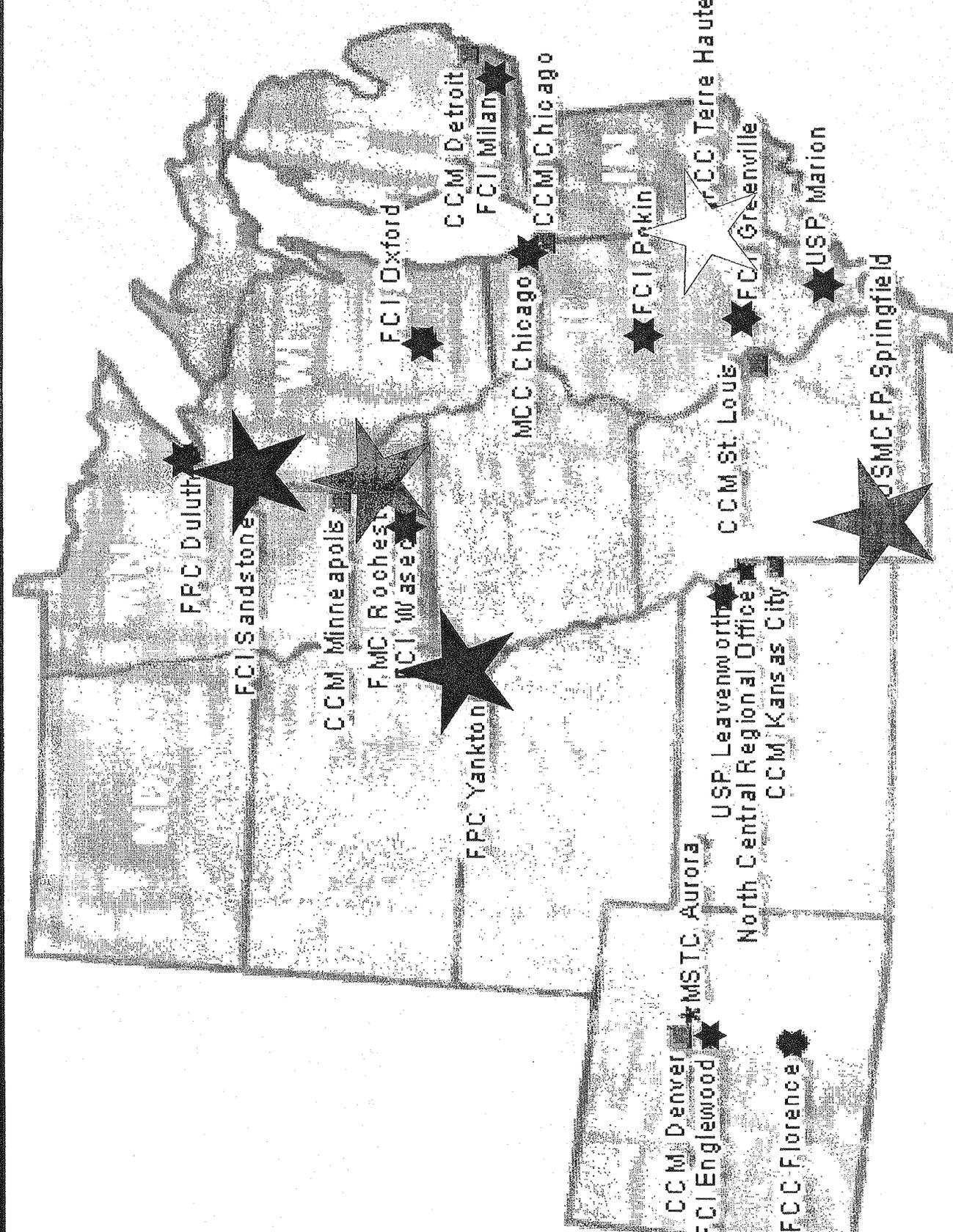
Care 3

FCC Terre Haute, Indiana

Care 4

FMC Rochester, Minnesota

MCFP Springfield, Missouri



FPC Duluth

FCI Sandstone

CCM Minneapolis

FMC Rochester

FCI Waseca

FPC Yankton

FCI Oxford

CCM Detroit

FCI Milan

CCM Chicago

MCC Chicago

FCI Pakin

MSTC Aurora

CCM Denver

FCI Englewood

USP Leavenworth

North Central Regional Office

CCM Kansas City

FCC Florence

CC Terre Haute

FCI Greenville

USP Marion

USMCFP Springfield

Institution Hearing Program (IHP)

- Initial Designation to IHP Hearing Site If less than Seven Year Sentence
- Inmates with Longer Sentences May Transfer to IHP Site for Hearing w/ Five Years of Release.
- No IHP Sites in the North Central Region

LIFE Connections

Faith-based programming

- 3 multi-faith programs in NCR
 - ▶ USP Terre Haute, IN (high security)
 - ▶ USP Leavenworth, KS (medium security)
 - ▶ FCI Milan, MI (low security)
- Programming offered by contract staff
 - ▶ Inmates are connected with spiritual mentor
 - ▶ Linkages developed with community resources at release destination
 - ▶ Goals: Restoration with God, family, community and self
- Prioritized based on release date

Drug Abuse Programs (DAP)

- **BOP Drug Abuse treatment includes three standard offerings:**
 - ▶ **Drug Abuse Education, 28 CFR § 550.54**
 - **Educate & motivate; offered everywhere; @ 24 hrs**
 - ▶ **Non-Residential, 28 CFR § 550.55**
 - **Outpatient substance abuse treatment; common CBT journal + individualized focus; offered everywhere; unlimited duration**
 - ▶ **RDAP 28 CFR § 550.58, 500 hrs**
 - **Residential treatment; includes 500+ hours; requires Acute Substance Use Disorder Diagnosis**

RDAP

- 18 USC § 3621(e)
- Qualified for RDAP: diagnosed substance use disorder WITH documentation AND adequate time to complete program.
- Qualified individuals may receive up to a one-year reduction in their sentence.
- Eligibility for early release: no violent current or prior adult convictions AND no current or prior adult convictions that preclude based on the Director's Discretion. *Lopez v. Davis*, 531 U.S. 230 (2001).

Drug Abuse Programs (DAP)

2008 Report to Congress

- 59 RDAP locations in the BOP (13 in NCR)
- 9 month residential program followed by 6 months of community based after-care
- FY 2007 - 178,549 RDAP participants
 - ▶ 182,000 inmates have participated in RDAP since 1990
- FY 2007 - 15,432 community based after-care
 - ▶ 141,000 inmates have participated in after-care since 1990
- FY 2007 - 4,934 inmates obtained early release benefit averaging 7.7 months

RDAP Early Release Eligibility

New Agency Regulations

- ▶ Effective March 16, 2009
 - Expanded list of ineligible prior convictions: Homicide, Forcible Rape, Robbery, Aggravated Assault, Arson, Kidnaping, or Child Sexual Offenses. 28 C.F.R. § 550.55(b)(4)
 - Only the elements of the offense is reviewed, not offense conduct

RDAP Early Release Eligibility

Prior Conviction Review

- Inmates convicted of an attempt, conspiracy, or other offense involving any of the precluding prior convictions are also ineligible for early release.

RDAP Early Release Eligibility

Review of Current Offenses

- 28 C.F.R. § 550.55(b)(5)(i)-(iv). BOP's Director's Discretion utilized to disqualify inmates with current felony offenses:
 - Use of physical force against person/property of another;
 - Use of firearm or other dangerous weapon or explosive;

RDAP Early Release Eligibility

Review of Current Offenses cont.

- 28 C.F.R § 550.55(b)(5)(i)-(iv). BOP's Director's Discretion utilized to disqualify inmates with current felony offenses:
- Presents a serious potential risk of physical force against the person or property of another; or
- Involves sexual abuse offenses committed upon children

RDAP Early Release Eligibility

Other Changes Effective March 16, 2009

- **Sliding scale of Reduction in Sentence**
 - 30 month or less (6 months max)
 - 31-36 months (9 months max)
 - 37 month or more (12 months max)

Prior recipient of early release not eligible for second sentence reduction.

RDAP locations in NCR

MINIMUM Security

FPC Englewood, CO
FPC Florence, CO
FPC Greenville, IL (F)
FPC Leavenworth, KS
FPC Yankton, SD
FPC Duluth, MN

MEDIUM Security

FCI Milan, MI
FCI Oxford, WI
FCI Sandstone, MN

LOW Security

FCI Florence, CO
FCI Leavenworth, KS
FCI Waseca, MN

ADMINISTRATIVE
CORRECTIONS

Adam Walsh Child Protection and Safety Act of 2006

- Enacted July 27, 2006
- Created 18 U.S.C. § 4248
- Authorizes the Director to certify as a sexually dangerous person (SDP):
 - ▶ Persons in the custody of BOP
 - ▶ Persons committed to the AG pursuant to 18 U.S.C. § 4241(d)
 - ▶ Persons for whom all criminal charges have been dismissed for reasons solely relating to the person's mental condition

Major BOP Responsibilities Under the Act

Sex Offender Registration and Establishment of Programs

- BOP must inform sex offender of duty to register
- BOP must establish sex offender management programs and sex offender treatment programs in each region

Sex Offender Management Program (SOMP)

6 SOMP Programs Nationwide

- Mandatory Program Assignment
- Individually tailored
- Inmates normally admitted upon initial designation & remain for duration of incarceration
- Management of problem behaviors (stimulus materials, abuse of phone, mail, visiting)

SOMP

- FCI Petersburg, VA (medium)
- FCI Seagoville, TX (low)
- USP Marion, IL (medium)
- FCI Marianna, FL (medium)
- USP Tuscon, AZ (high)
- FMC Devens, MA (low)

Sex Offender Treatment Program (SOTP)

One Current Site - FMC Devens

- Voluntary residential treatment program
- Provides tools needed to gain control of their sexual deviancy and develop methods to prevent relapse
- Interactive self-study program designed to motivate inmate to take responsibility for sexual offense
- All security levels

Commitment under 4248

BOP Procedures

- Act created statutory commitment process for sexual offenders
- State placement will be attempted
- Committed individual can be released under prescribed regimen if/when deemed no longer sexually dangerous to others, or can be effectively released under prescribed treatment regimen

MS v. Tom

Categories of Inmates Reviewed for Potential Certification

- Sentenced inmates
 - ▶ Includes DC Code offenders, military prisoners, treaty transfers
- Inmates found incompetent and unrestorable under 4241(d)
- Inmates who charges are dismissed due to mental condition
- Inmates NOT reviewed:
 - ▶ Pretrial inmates
 - ▶ Held as material witnesses or on contempt orders

Categories of Inmates Referred for Certification Review

- PSF Sex offender or some documented history of actual or attempted sexually violent conduct or child molestation
- < 18 months from PRD

Certification Criteria

18 U.S.C. § 4247 (a)(5) and (6)

- **Definition of Sexually Dangerous Person**
 - ▶ A person who has engaged or attempted to engage in sexually violent conduct or child molestation; and
 - ▶ Who is sexually dangerous to others
 - 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

Behavioral Element

“Engaged or attempted to engage in sexually violent conduct or child molestation”

- BOP regulation final December 2008
 - ▶ 29 C.F.R. § 549.72 - sexually violent conduct
 - ▶ 29 C.F.R. § 549.73 - child molestation
- Evidence of behavior:
 - ▶ Court, law enforcement, institutional records
 - ▶ Self-admissions
- § 4248 does NOT require a conviction
- Child pornography - possession or trading in CP, by itself, generally not enough

Certification

- Certificate is prepared and signed by chairman
- Certificate is forwarded to USAO for filing in district of confinement
- Filing of certificate:
 - ▶ Stays release of inmate
 - ▶ Initiates judicial commitment process

Civil Commitment Proceedings

- Court may order forensic evaluation
- Court holds final hearing to determine whether inmate is SDP
- Rights of certified inmate: counsel, testify, present evidence, cross-examine gov't witnesses (no right to jury trial)
- Burden of proof - clear and convincing

Commitment of SDP

- Committed to custody of AG (BOP) for indefinite term
- Must attempt state placement where domiciled or tried
- When state placement not possible, placed in suitable facility for sex offender specific treatment (FCI Butner)

Review and Discharge

- Annual reports of mental condition submitted to court
- Discharge
 - ▶ Will not be sexually dangerous to others (unconditional)
 - ▶ Will not be sexually dangerous to others if released under prescribed regimen of medical, psychiatric, or psychological care or treatment (conditional)
- ▶ Director of facility certifies when SDP is suitable for discharge
- ▶ SDP may file motion for discharge > 180 days after initial commitment

Commitment Hearings

First commitment hearing U.S. v. Dowell (W.D. Okla.)

Court determined inmate did not presently suffer from mental illness, abnormality, or disorder.

- ## First commitment U.S. v. Shields(D. Mass.)

Court issued commitment order.
Currently on appeal to 1st Cir.

Residential Re-entry Centers

- ✓ The official title "Community Based Programs" (a/k/a Community Corrections Center) has been officially changed to Residential Re-entry Center.
- ✓ Must Be Appropriate For Community-Based Facility Per BOP Policies.

Residential Re-entry Centers

- Residential Re-entry Centers are designed to facilitate inmates' successful transformation from incarceration back to the community.
- Programs are NOT intended for the long term housing of offenders.
- The range of programs and services continues to expand in efforts to accommodate inmates with special needs (mental health).

2nd CHANCE ACT

- April 9, 2008, Second Chance Act was enacted.
- Requires all inmates to be reviewed for a maximum of 12 months RRC
- Act identifies five criteria to be considered when determining length of RRC placement

5 Criteria

- 1- Resources of Facility Contemplated
- 2- Nature and Circumstances of Offense
- 3- History and Characteristic of Offender
- 4- Statements by Sentencing Court
- 5- Any Pertinent Program Statements issued by the Sentencing Commission
 - ▶ Any RRC placement beyond six months must be approved by the Regional Director

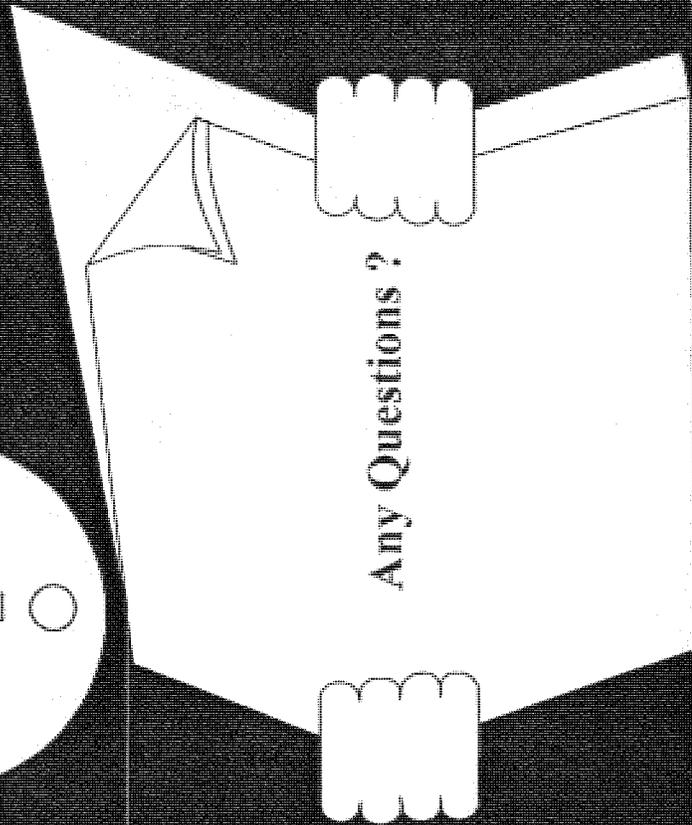
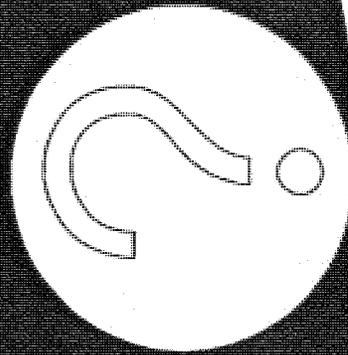
Home Confinement

- Participation in home confinement is limited to the last 10% of an inmate's term of incarceration, not to exceed 6 months.
- BOP has a national strategic objective to maintain at least 20% of all eligible inmates on home confinement.
- Inmates are typically considered for home confinement after they acquire suitable financial and community benefit from placement at the Residential Re-entry Centers.
- Home confinement surveillance may or may not be provided using electronic monitoring.



CONFIDENTIAL

QUESTIONS?



HUMANIZING THE SENTENCING PROCESS

PRESENTED BY

KENT SIMMONS

CJA ATTORNEY

DAVENPORT, IOWA

HUMANIZING THE SENTENCING PROCESS

-With Undisputed Facts-

-Kent A. Simmons-

May 21, 2009

THE CONCEPT

In August of 2007, I took on representation for a man who had pled guilty and been sentenced on child pornography charges, the trial attorney had put together an impressive collection of documents concerning the client's accomplishments and his conduct while on an extended pretrial release. At the same time, the presentence investigator's report also contained a lot of positive information, though it was somewhat scattered in different portions of the report. There was a good story there, but it wasn't being put together and related in a compelling way. In the post-*Booker* world, I thought it was necessary to set out a fairly lengthy narrative biography in my opening brief that would describe a person who was sentenced far beyond what was necessary. We needed to tell a story.

After the *Gall* decision in December of 2007, the Honorable Robert W. Pratt was in great demand for seminars and other speaking engagements. He quipped that suddenly he was being asked to speak at law schools where he never could have gained admission as a student. I saw the judge twice in seminars in

2008. His message to defense attorneys is paraphrased as this: “You have got to be creative. You have got to find and show us the reasons why a Guidelines sentence is beyond what is necessary.”

Of course, Judge Pratt never would have been a celebrity if Mario Clairborne had not been gunned down on the streets of St. Louis in May of 2007. In the end, however, I believe the *Gall* case tells a better story as to why a particular defendant was properly given an “extraordinary” break at sentencing. I also believe the *Gall* case was selected for certiorari in large part because Judge Pratt sat down and wrote a detailed memorandum, setting the facts of Brian Gall’s life that led him to give the kid a break.

This is the kind of story we need to be telling judges *before* we get to sentencing. The mechanical structures of the Guidelines and Presentence Investigation reports have taken the humanity out of the sentencing process. We need to show the judges that our clients are real human beings, with real struggles and triumphs, and that there are good people who love them. This is most effectively done in presentence memorandum you prepare and get to the judge as far *before* sentencing as possible. You can’t expect your narrative to bring the judge to tears, but if you can just take some of the edge off the demonic diatribe the Guidelines and PSIR have drawn up, then you have succeeded. And those

good people who love your client that you write about, make sure they're in the courtroom at sentencing.

-A Pornography Case-

STATEMENT OF THE FACTS

David Bond was born in 1959, and he grew up in the relatively small town of Salina, Kansas. His father was a teacher, school principal, and superintendent of the Salina schools. His mother worked some part-time jobs, "but was mainly a stay at home mother." Mr. Bond described his mother as an emotional person who "put a lot of stock in her faith." His childhood was stable and his family relationships were warm. He "has maintained very close relationships with his three sisters." Although his father was often absent while pursuing his professional duties, Mr. Bond developed a great deal of respect toward his father's devotion to his profession. He told the presentence investigator "that he had a lot of respect for his father's knowledge and the pride he took in his job as an educator, school principal, and superintendent." (Presentence Investigation Report [PSIR], pp. 12-13).

Not surprisingly, Mr. Bond's school years were marked by several accomplishments. He was a student council president. David was an active

participant on the track, baseball, football and basketball teams, as well as other school sponsored activities. After high school, he attended junior college in Salina, and finished with a 3.11 grade point. From there, he went on to the University of Kansas to earn degrees as both a Bachelor of Architecture and a Bachelor of Environmental Design. Through the years, David obtained architectural licenses in Arizona, California, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, Ohio and New York. (PSIR, 13, 17)

While David was in college, he started dating Lydia. They have now been married since 1989. Lydia had two children from a previous marriage.

“According to Lydia, her children were young adults when she [married] the defendant, but the defendant has always been a second father to them and her children ‘love the defendant dearly.’” (PSIR 13-14). In 2001, David took a position as an architect with Stanley Consultants, and he and Lydia moved to Muscatine, Iowa. (PSIR, 17). The Indictment in the instant action covered conduct from 2001 to February 9, 2005. (Indictment, 12/14/05). On February 9, 2005, federal agents executed a search warrant at David and Lydia’s home in Muscatine. David was cooperative with agents and answered their questions as to how he got started in viewing child pornography on the Internet. It had been about a year and a half at that point since he had begun downloading images on

his computer. He told the agents exactly how he had obtained the images, and he told them he had not downloaded anything in the few months before that February, 2005 interview. The agents seized a laptop computer, two towers and some disks. (PSIR 4-5). It was over ten months before Mr. Bond was indicted.

At his Initial Appearance on December 30, 2005, Magistrate Judge Thomas J. Shields released Mr. Bond on pretrial release with supervision and an unsecured appearance bond. (Order Setting Conditions, 12/30/05). He continued his employment with Stanley Consultants. On January 23, 2006, Mr. Bond voluntarily met with an FBI special agent to offer all the information and assistance he could in regard to the ways in which child pornography is found and traded on the Internet. "Bond stated he only traded child pornography files from his home and never exposed any members of his family to these files." He never purchased or sold any of the images. It was all obtained and re-distributed by downloading and file sharing on the net. (PSIR, 6-7, 9-10)

Mr. Bond told the FBI his downfall evolved from his fascination with the Internet. His explanation and description of his conduct was extensive, not only to the FBI, but also to the presentence investigator, two psychologists and the sentencing judge. Judge Jarvey referred to the psychologists' evaluation as a "psychosexual investigation" and stated he would "rely heavily" on those reports

in selecting the sentence. (Sent Tr. , p. 14). That investigation was first conducted by Dr. David McEchron, Ph D. The presentence investigator summarized the doctor's diagnosis:

In Dr. McEchron's opinion, the defendant "qualifies for diagnoses of Adjustment Reaction with Mixed Features of Anxiety, Depression, and Paraphilia, NOS," but does "not meet the criteria for a diagnosis of pedophilia" and does not appear to present a significant risk to the community at large. Based on the various risk protocols applied to the defendant, Dr. McEchron believes the defendant falls in the low risk category for re-offense. (PSIR, 16).

The Government also hired a psychologist to examine Mr. Bond. That psychologist made findings that were virtually identical to Dr. McEchron's. Mr. Bond wandered into his crimes initially through what could only be described as an obsession with the Internet. He told the presentence investigator that, prior to the Search Warrant, he was spending two to three hours per night on the net. He originally had perused sites that dealt with violence and death, and was in related chat rooms exchanging files. The child pornography first appeared to him as it was intermingled with violence files. He then explored pornographic sites. David told the FBI, on the day the search warrant was executed, that he "was

flabbergasted that this stuff existed.” He said “he got carried away in seeing how far it would go.” (PSIR p. 5, 9). Other than the instant case, Mr. Bond has no juvenile or adult criminal history. (PSIR 11-12)

Mr. Bond eventually explained to the sentencing judge that he did not collect these images out of sexual stimulation, rather “it was more utter dismay of wondering how far this information would go.” He told the judge, “I was astonished by it. I was intrigued by it. I was passing a wreck on the freeway.” (Sent. Tr. 10). In another analogy, David told the presentence investigator “the images were similar to pieces of paper or trash on the street that he picked up and looked at. He discarded them and others picked them up.” Similarly, when first confronted by the FBI at his home, he told the agents the images didn’t mean much to him, and he could immediately stop the conduct. (PSIR. pp. 5, 9) Mr. Bond’s explanations of his offenses are all consistent with the psychosexual investigation Judge Jarvey relied heavily upon. The testing and protocols disclosed there was no pedophilia and a low risk for re-offense. (PSIR, 16).

-Another Pornography Case-

STATEMENT OF THE FACTS

The presentence investigation report (PSIR) shows Mr. Green's parents provided for a normal and comfortable childhood. He was born the oldest of three children in 1957. A sister and then a brother were born in the next few years. His parents have remained married all of Mr. Green's life. The family relationships have always been good. Mr. Green was never subjected to any type of abuse from family members, and the family never suffered any financial problems. (PSIR p. 14).

From the time he was two or three years old, Mr. Green lived in Clinton, Iowa. At the age of five, he participated with peers in a common practice of exposing their genitals to each other. He did this with girls his own age "He stated they pulled down [their] pants, then he pulled down [his], and [they] looked at each other.' The defendant indicated these behaviors continued for a couple of years with 'the whole neighborhood.'" (PSIR, 17).

Mr. Green's sexual history also disclosed his victimization at the age of 10. A high school age male had befriended young Jim and on one occasion "raped" him. Mr. Green told the presentence investigator he had been confused, afraid

and embarrassed by the rape, but he never told anyone because "it was not something you talked about." (PSIR 17).

Jim went on to graduate from Clinton High School in 1975. He enlisted in the Air Force a couple months later and was stationed in Idaho. In 1976, he married Cheryl. By 1979, Jim was honorably discharged from the Air Force, but his marriage to Cheryl also ended in divorce. They had no children. A major disagreement was Cheryl's wish to move back to Clinton. Jim wanted to stay in Idaho. (PSIR 15, 21)

Jim Green did eventually move back to Clinton, and he married Tammy in 1987. The couple had two sons, in the next few years. In 1991, Mr. Green followed in his father's footsteps and entered an apprenticeship as a millwright. He successfully completed the training in 1995. His skills provided him with steady employment, and by the time he was arrested in 2006, Mr. Green was making \$22 per hour. Despite the blessing of two sons and Jim's success as a millwright, his marriage with Tammy failed. (PSIR 16, 21-22).

When the boys were in their teens, Jim left the home. The marriage with Tammy had not been working for a long time. Jim had "caught her with seven different men." The final straw was when Jim found her in his own bed with another man. Mr. Green identified the root cause of the failure of the marriage to

be Tammy's excessive use of alcohol. Mr. Green never had any stomach for alcohol or controlled substances. He estimated he may have had a total of six beers in his entire life. He tried marijuana once. It made him sick, and he never tried it again. (PSIR 16, 21)

Seven years into that marriage, in 1994, Jim suffered a heart attack. He believed it was caused by heat and stress. He has complications:

As a result of the heart attack, the defendant indicated he has problems breathing, and his chest tightens up when he is overworked from physical activity or chores. He compared the feeling to indigestion. In addition, the defendant reported his heart condition has affected his short term memory and he had difficulty remembering recent events. (PSIR 18)

While still married to Tammy, Mr. Green began viewing adult pornography on his computer. Tammy was unaware he was doing this because Jim had his own room for the computer. He began viewing child pornography. He first became aware of the availability of those images while he was "online" and they "happened to pop-up in a news group." Jim then started "seeking out child pornography." Mr. Green admitted to the presentence investigator, "He preferred to view 'nude females' between the ages of 'puberty to 50'"..... He admitted he has a "sexual problem." While he has never undergone a psychosexual evaluation, the defendant indicated "he would be willing to

participate if such treatment was recommended." (PSIR 20)

Jim and Tammy's divorce was final in December of 2004. Mr. Green told the presentence investigator his sons had handled the divorce well because "they saw it coming." The boys knew Tammy had relationships with other men. Though the decree awarded custody to Tammy, Jim's sons chose to live with him. (PSIR 16). Also, in 2004, Jim rekindled his relationship with his first wife, Cheryl, which continued through the time of sentencing in 2008. Late in May of 2006, two of Tammy's nieces notified police that Tammy told them about a videotape:

The two adult females reported that their aunt had advised them that she found a videotape that contained images of them when they were minors as they were getting in and out of the shower in their residence. They were completely nude in the videos. Neither of them was aware that these recordings had been made. (Guilty Plea, Stipulation, , p. 10, 4/18/07, Doc No. 42).

The nieces had lived next door to Jim for a number of years, and one of them still lived next door to him when they took the videotape to the Clinton police. Mr. Green twice agreed to go to the station when police contacted him. He agreed to go to the department first on June 1, after arriving at home while officers were executing a search warrant. Before going to the station, Mr. Green assisted police in seizing his videotape collection. (PSIR 7):

On June 1, 2006, Detective Brian Pohl obtained a search warrant for Green's residence in Clinton. Jim Green, Jr. arrived during the search. He admitted to officers that he had a refrigerator with a lock on it in the basement and he told them where the key to it was located. Green advised that the police would find videotapes in the fridge. Sgt. Ron Heeren asked Green to meet with the police down at the police station and he agreed. Green came on his own to the station and was advised that he could leave at anytime. (Guilty Plea Stip., p. 10)

He again agreed when police asked him to go back to the station the next day. Mr. Green lied to police initially about where he had obtained the tapes. He first said he found the videotapes while he was four-wheeling out near a lock and dam. The day after the search warrant, Mr. Green admitted his involvement in everything the police had seized, however. He denied sharing or sending any pornography by email, but he admitted he probably had a couple thousand pictures stored on his computer and CD's. He admitted he installed the hidden video camera in a bathroom of his sister-in-law's house while her family was away on vacation back in the 1990's. Mr. Green had run a coaxial cable through an underground conduit from the hidden camera to his own house. He then was able to monitor the bathroom in a live feed to his television and able to videotape the feed. Mr. Green admitted to police that he knew his child pornography was "wrong," and he knew it was illegal. The pornography appealed to him because it

reminded him of the best part of his life, when he was young and played "you show me and I'll show you." (PSIR, 7-9; Guilty Plea Stip. 10-12)

At sentencing, the defense argued that none of the videotape evidence should be used against Mr. Green to enhance his sentence because he made the videotapes outside the timeframe allowed by the statute of limitations. Defense counsel had raised the same objections to the PSIR. Mr. Green's attorney told Judge Jarvey just how the Guidelines should be used to calculate a final Combined Adjusted Offense Level of 33. The prosecution agreed with the PSIR that the videotaping conduct should be figured into the Guidelines calculations for a final level of 40. Both parties allowed for a three level reduction for acceptance of responsibility. The defense calculation resulted in a Guidelines range of 97-121 months. The Government's position recommended a range of 210-240 months. Mr. Green had virtually no criminal history. As he stood before Judge Jarvey at 51 years of age, his record showed only a *nolo contendere* plea to a charge of littering city property when he was 29 years old. The offense is not counted as history point. Judge Jarvey sentenced Mr. Green to **220** months imprisonment. (PSIR , 11-13, Sent. (4/7/09) Tr. ,pp. 3-8; Sent. (4/18/08) Tr. , pp. 13-14)

-A Drug Conspiracy Case-

STATEMENT OF THE FACTS

Tommy Walter was born in May of 1969. His father was a truck driver and his mother was a nurse. He did not have a normal or happy childhood. He was the victim of his father's physical abuse, and he witnessed his father's assaults upon his mother until the couple divorced when Tommy was only six years old. His contact with his father from that point was minimal. At the same age, a maternal uncle began sexually abusing Tommy, and that continued until he was ten years old. The uncle also sexually abused Tommy's younger sister and brother. His mother initially did not believe the sex abuse complaints, but when she finally determined the truth, the abuse stopped. Unfortunately, it went on for four formative years of Tommy's life. (PSIR 26)

Mr. Walter's teen years were marked by instability. He was involved in several romantic relationships and fathered children through his teens and into his twenties. He has six children, but has not been able to establish a relationship with any of them. He began drinking at age 16, using marijuana when he was 17, and at age 22 he tried crack cocaine. "He instantly became a daily user of crack cocaine." He has been an addict ever since then. When he was arrested in the

instant action he had just turned 38 years old. (PSIR 27, 30).

Mr. Walter's sister is one year younger. She described Tommy as a good person, and she remembered that he was a "very smart child." He attended Carver High School in Chicago into the eleventh grade in 1988, then obtained his GED later that year. (PSIR 28, 31). His criminal history began shortly before that. At age 17, he was arrested for Aggravated Criminal Sexual Assault in January of 1987. In 1988, he was sentenced to 8 years imprisonment, but was paroled in December of 1990. Three years later, he was discharged from parole at the end of 1993. (PSIR 20).

Through the 1990's, Tommy battled clinical depression and his substance abuse. The dual diagnosis led to hospitalization and social security disability benefits. By October of 1999, at age 30 years old, Tommy was again facing a sexual abuse charge as well as property damage. The complainant was the mother of one of his children. Eight days later he was charged for assaulting the complainant by striking her in the face. The resulting sentence of 364 days on the original charges was rolled into a four-year prison term for the subsequent assault. Those convictions arising out of the October 1999 incidents were Mr. Walters's last for assaultive conduct. He was paroled August 1, 2001. From there, he had only two minor Drug Paraphernalia convictions. One resulted in 3 months

probation and the other in a \$50.00 fine. (PSIR 21-22, 29),

From the mid-90's to the time he fell in with the small drug ring indicted in the instant action, Mr. Walter constantly struggled with his addiction and his depression. He tried to treat it, and he failed. His efforts are documented in these three paragraphs of the PSIR:

120. When the defendant was 22 years old [in 1991 or 92], he began using crack cocaine and indicated he instantly became a daily user of crack cocaine. The defendant stated crack cocaine as his drug of choice and admitted he has an addiction.

121. The defendant self-referred himself to substance abuse treatment three times. On September 12, 1997, the defendant successfully completed an 18 day residential treatment program at Loretto Hospital in Chicago, Illinois. He was admitted to the detoxification unit at Haymarket Center in Chicago, Illinois, on March 28, 2003. The defendant was given the diagnosis of Cocaine Dependence, Cannabis Abuse, and Alcohol Abuse. The defendant left Haymarket Center against staff advice on March 31, 2003, and reported he left to use crack cocaine.

122. In 2006, the defendant was evaluated and underwent treatment at Common Grounds Rehabilitation Center in Pennsylvania. A records request was sent to Common Grounds Rehabilitation Center, however, to date, nothing has been received. According to the defendant, the longest he has been able to remain sober in an outpatient setting is 30 days and during those 30 days, the defendant indicated he stayed busy with employment and extra-curricular activities. The

defendant stated his trigger to use drugs is sexual intercourse because of the instant gratification that results in both drug use and sexual intercourse.

After his failure at Haymarket Center, in Chicago, Mr. Walter moved to Harrisburg, Pennsylvania later in 2003. He lived there until the end of 2006. He should have stayed there. He had no convictions in Pennsylvania, and he received treatment there. (PSIR 22, 28-30). When he moved back to Chicago, he did not stay long. He moved to Davenport, Iowa to see old friends, but fell into old habits. He fell into a 30-year prison sentence.

The PSIR and Judge Jarvey relied on indicted co-defendants Shawn Barnes and Amber Self to determine the amount of crack for which Mr. Walter should be responsible. (PSIR 12-14: Sent. Tr. 34-37, 46-47) At sentencing, in allocution, Mr. Walter explained to the judge that those co-defendants' statements were false in critical facts and way out of proportion in others:

People got up on the stand and testified that okay, I sold drugs. Well, what did I sell? A bag or two. Well, where is it I'm responsible for a - - a kilo of crack cocaine? I've been getting high 16 years, Your Honor, I have never seen a key and a half of crack cocaine in 16 years of using and - and they want to say in two months that I'm responsible for a key and a half. I've never seen Shawn Barnes, I never saw Shawn Barnes, I never saw Andre Williams, I never saw Swift, I never saw any of them sell any drugs so how can that be reasonably foreseeable? I was not involved in it.

When I - - when I started getting high down here I ran from them. I didn't want to be around them. I didn't want them to see me get high because they were my friends, Your Honor.

THE COURT: How much crack did you distribute in 2007?

THE DEFENDANT: Your Honor, totally, the total amount would be less than an ounce of crack and that's truthful, Your Honor, because the only time that I would sell crack was to get enough money to - - so I could go and purchase some more.

I did - - Your Honor, when I - - when I was arrested, when I was arrested April - April 26th, I had \$93 in my pocket. An ounce of crack cocaine costs \$900. When the police searched my hotel room, they didn't find any crack because I didn't have any crack. They found crack pipes and soda - - baking soda. When I was arrested May 23rd - the 28th, I had \$5 in my pocket. I had - - where is all this - - where is all this money I was supposed to make if I was selling that ounce of crack every single day, Your Honor, I would have had some money. I wouldn't be bumming cigarettes. I was bumming cigarettes. I had \$5 in my pocket when I was arrested May 20th -28th. Right after my birthday I had \$5 in my pocket, Your Honor. Where is all this money from? Where did all the money go? If I'm selling all these drugs every single day and if we believe Amber[Self] that I was being fronted an ounce, which I wasn't, that means that - - that's \$1600. Where is - - where is all this money? Where did all this money go?

Your Honor, if I smoked - - if I smoked all the crack that they said I'm responsible for, I would be dead.

It's impossible to smoke that much crack and if I was selling that much crack, I would have some money. I didn't have anything, Your Honor. I don't have anything. (Sent. Tr. 39-41)

* * * *

I told - - I told my lawyer where I got my drugs from . My lawyer told Mr. Cronk, [the prosecutor]. Mr. Cronk didn't even want that. He wanted me to testify against Mr. Williams. How can I testify against Mr. Williams? Mr. Williams ain't never give me no drugs to sell. I never had anything to do with him. I never had anything to do with him. I've - - for the life of me I don't understand this whole dilemma. I don't understand this.

Thank you, Your Honor. I appreciate you hearing my ranting and raving. I just had to get it off my chest because I - - I seen so many wrongs and, you know, unfortunately I don't have the proof, the hard proof to dispute, but I just want to thank you. Thank you. (Sent. Tr. 43).

Mr. Walter's attorney told Judge Jarvey the mandatory minimum sentence of 10 years imprisonment would certainly be sufficient to meet the needs of the sentencing statute. The judge did not address that particular request. Instead, he followed the PSIR quantity estimate of 500 grams to 1.5 kilograms, added 3 levels to the Guidelines calculation for a managing or supervisory role, and added 2 levels for obstructing justice because Mr. Walter chose to speak in his own defense at sentencing. That math exercise brought the judge to a range that

bottomed out at 30 years, which is close to **11,000 days** in prison. (Sent. 36-37, 47-48). The sentence provides for the imprisonment of Mr. Walter from the age of 38 to the age of 68.

ETHICS

PRESENTED BY

MATTHEW MCDERMOTT

CJA ATTORNEY

DES MONIES, IOWA

ETHICS
Federal Defender Spring Seminar
May 21, 2009

Matt McDermott
Belin Lamson McCormick Zumbach Flynn
A Professional Corporation
666 Walnut, Suite 2000
Des Moines, IA 50309-3989
515-283-4643
mmcdermott@belinlaw.com

MANAGING FEES ETHICALLY

- I. Fee arrangements and trust accounts (Chapter 45)
 - a. Complete records shall be maintained on all funds and property coming into the possession of the attorney, and the attorney must regularly account to the client for such property and funds. (R. 45.2(2))
 - b. Books and records relating to funds or property of clients shall be preserved for at least six years after completion of the employment to which they relate. (R. 45.2(2))

- II. Eligible Financial Institutions (Rule 45.3)
 - a. Ordinary prudence required in selecting “bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company.”
 - b. The financial institution must be authorized to do business in Iowa by federal or state law.
 - c. The financial institution must be insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or the Federal Savings and Loan Insurance Corporation.
 - d. Withdrawals and transfers must be permitted without delay, subject to notice period required by law or regulation.

- III. Interest-bearing trust accounts (Rule 45.4)

- a. Must use a pooled interest bearing trust account for deposits of funds that are nominal in amount or reasonably expected to be held for a short period of time. (R. 45(4)(1))
 - i. Lawyer must inform the client/third person that interest accruing on that account (less any service charges) will be paid to the Lawyers Trust Account Commission. (R. 45.4(1))
- b. Funds must be deposited in that account unless they are deposited in:
 - i. A separate interest-bearing trust account for the particular client/third party (R. 45.4(2)(a)); or
 - ii. A pooled interest-bearing trust account *with subaccountings* that will provide for computation of interest earned by each client's/third party's funds. (R. 45.4(2)(b))
- c. If the client's/third party's accounts "could generate positive net earnings for the client or third person," the lawyer must deposit the funds in the type of account spelled out in R. 45.4(2)(a). Six factors to consider:
 - i. The amount of funds to be deposited,
 - ii. The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held,
 - iii. The rates of interest or yield at the financial institution in which the funds are to be deposited,
 - iv. The cost of establishing and administering the account, including service charges, the cost of the lawyer's services, and the cost of preparing any tax reports required for interest accruing to a client's benefit,
 - v. The capability of financial institutions described in Rule 45.3 to calculate and pay interest to individual clients, and
 - vi. Any other circumstances that affect the ability of the client's funds to earn a net return for the client.
- d. Accounts created under Rule 45.4(1) (Rule 45.4(4)). The lawyer or law firm shall direct the financial institution:
 - i. To deposit interest or dividends net of allowable monthly service charges at least quarterly to the Lawyer Trust Account Commission.
 - ii. To send a copy of the depositor's statement to the attorney, detailing the interest rate, monthly service charge, and account balance.

- iii. To report to the Client Security Commission if a properly payable instrument is presented against an account with insufficient funds. The report shall be made simultaneously with any dishonor by the bank or within five banking days of the date of presentation of documents if the instrument is dishonored.

IV. Certification (Rule 45.6)

- a. Each lawyer with a client trust account must annually certify that records are being maintained properly in accordance with Rule 32:1.15(a).

V. Requirement for client trust account (Rule 32:1.15)

- a. Client funds in the lawyer's possession shall be kept in a separate account and property shall be identified and safeguarded. Complete records shall be kept and preserved for six years after termination of representation.
 - i. Lawyer is held to professional fiduciary standards. Securities should be held in a safe deposit box. (Comment 1)
- b. A lawyer may deposit personal funds into a client trust account solely for the purpose of paying bank service charges and in amounts necessary for that purpose.
 - i. Accurate records must be kept regarding which funds belong to the attorney. (Comment 2)
- c. Fees paid in advance of the lawyer's earning such fees shall be deposited in the account and withdrawn as earned.
 - i. Overpaid funds should be returned to the client, but funds may be retained in the amount that dispute over fees remains. This means should not be used in a coercive manner to force the client to agree to the disputed fee amount, but a means for prompt resolution should be suggested. (Comment 3).
- d. The lawyer should notify a client or third person upon receipt of funds or property in which they have an interest. Except as prohibited, such property or funds should be distributed promptly and an accounting made if requested.
- e. Property to which two or more people claim an interest shall be separately preserved until the claims are resolved.
 - i. Where third party claims are non-frivolous, the lawyer must refuse to return disputed property to the client until claims are resolved. If there are substantial grounds for dispute, the lawyer may petition the court to resolve the dispute. (Comment 4)

- f. Must comply with Chapter 45 of Iowa Court Rules.
- g. Further Comments:
 - i. Lawyers providing service other than to render legal service may be subject to other applicable laws, such as when an escrow agent is governed by fiduciary laws. (Comment 5)
 - ii. Lawyer participation in fund for client protection and reimbursement as a result of dishonest conduct of a lawyer is mandatory to extent required in Chapter 39 of Iowa Court Rules. (Comment 6)

VI. Retainers and advance fee payments

- a. Advance Fee Payments (Rule 45.7)
 - i. Are payments for contemplated services made prior to the lawyer's having earned the fee.
 - ii. Advance expense payments are considered to be advance fee payments.
 - iii. Advance fee payments must be deposited in the trust account and withdrawn only as fees are earned or expenses incurred.
 - iv. When such advance funds are withdrawn, the client must be notified in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The notice must be transmitted "no later than the date of the withdrawal."
 - v. Regardless of any agreement between the attorney and client, advance fee and expense payments are fully refundable if fees are not earned or expenses not incurred.
- b. Special Retainer (Rule 45.9)
 - i. Is a fee for contemplated services.
 - ii. Such fees are advance fee payments.
- c. Flat Fee (Rule 45.10)
 - i. Is a fee that encompasses all services that a lawyer will perform.
 - ii. If payment is made prior to performance of the services, the funds must be deposited into the trust account.

- iii. Client and lawyer may agree on a proportional withdrawal system, but the client's right to refund of unearned fees must be protected. The attorney may not withdraw unearned fees.

d. General Retainer (Rule 45.8)

- i. Is a fee in exchange for retaining the attorney's availability during a specified period.
- ii. Such fees are not advance fee payments and should not be deposited in the trust account.

VII. Recent changes to the Trust Account Rules

a. Third parties (Rules 32:1.15(a) and 45.1)

- i. The duty to safeguard client assets in the attorney's possession now extends to cover the property of third persons.

b. Clear "trust account" designation (R. 45.1)

- i. The title of the account in the law firm's records, on checks for the account, and on the records of the banking institution should include the words "Trust Account." This ensures that monies are protected under federal deposit insurance rules.

c. Commingling to avoid service charges (R. 45.1(1); 32:1.15 cmt. (2))

- i. Funds that are reasonably sufficient to pay or avoid paying service charges or fees may be deposited by the attorney into the trust account. Accurate records must be kept of the attorney money that is deposited for such purposes.

d. Notice to client regarding interest to IOLTA program (R. 45.4(1))

- i. If funds of a client or third party are placed in a pooled trust account because the funds are nominal in amount or are short-term in nature, the client or third party must be notified that net interest will be paid to the Lawyer Trust Account Commission under the IOLTA program in Chapter 43.

e. The six factors to consider in determining if the funds "could generate positive net earnings for the client or third person," consider the following factors: (R.45.4(3))

- i. The amount of funds to be deposited,

- ii. The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held,
 - iii. The rates of interest or yield at the financial institution in which the funds are to be deposited,
 - iv. The cost of establishing and administering the account, including service charges, the cost of the lawyer's services, and the cost of preparing any tax reports required for interest accruing to a client's benefit,
 - v. The capability of financial institutions described in Rule 45.3 to calculate and pay interest to individual clients, and
 - vi. Any other circumstances that affect the ability of the client's funds to earn a net return for the client.
- f. Conflicting claims on funds in trust (Rule 32:1.15)
- i. If the lawyer has possession of funds or property to which there are conflicting claims, the lawyers shall separately maintain such funds or property and refuse to disburse the funds or property where the claims are not frivolous until the claims are resolved.
- g. *Apland* requirements (*Bd. of Prof'l Ethics & Conduct v. Apland*, 577 N.W.2d 50 (Iowa 1998)) and Rules 45.7 - 45.10
- i. Advance fee payments must be placed in the client trust account until earned.
 - ii. "Flat fees" and "special retainers" are considered to be advance fee payments.
 - iii. Advance fees to cover expected expenses are also considered to be advance fees.
 - iv. Fees paid as true retainers – in exchange for a promise of future availability – are not advance fees.
 - v. When such advance funds are withdrawn, the client must be notified in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The notice must be transmitted "no later than the date of the withdrawal."

ETHICS IN ATTORNEY ADVERTISING

- I. Iowa's Unique Rules Regarding Attorney Advertising
 - a. The current "Iowa Rules of Professional Conduct" replaced the "Iowa Code of Professional Conduct" in its entirety per court order effective July 1, 2005.
 1. Although the new rules of professional conduct are based on the Model Rules of Professional Conduct, the rules governing lawyer advertising are substantially similar to those in the old Iowa Code of Professional Conduct. *See* "Report of the Iowa Rules of Professional Conduct Drafting Committee to the Supreme Court of Iowa."
 2. Iowa's attorney advertising rules have remained somewhat more restrictive than other states.

- II. What you can say and what you cannot say (Rule 32:7.1)
 - a. Constitutional background: Truthful attorney advertising that is not misleading cannot be subject to a blanket prohibition. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
 - b. "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."
 1. A communication must not materially misrepresent fact or law.
 2. A communication must not omit facts necessary to make a statement not materially misleading.
 - c. Communications with the public must not be "unverifiable."
 1. Statements should not rely on "emotional appeal" or relate to the "quality of the lawyer's legal services."
 - d. Comments:
 1. All statements regarding a lawyer's services must be truthful and verifiable.
 2. Misleading but truthful statements are prohibited.
 - i. A statement is misleading if it would lead a "reasonable person" to a specific conclusion about the lawyer or his/her services "for which there is no reasonable factual foundation."
 3. Any information that is published should be relevant, dignified, "disseminated in an objective and understandable fashion, and [should] facilitate the

prospective client's ability to make an informed choice about legal representation.”

- ii. The communication should not appeal to emotions or prejudices or create false hopes of success.
4. A communication must not imply an ability to improperly influence a government official or otherwise violate the Iowa Rules of Professional Conduct or other laws.

III. Advertising and Solicitation: where and when (Rule 32:7.2)

- a. Not subject to Rule 32.7.3, 32.7.3, and 32.7.4 are communications between lawyers, between lawyers and existing or former clients, and communications in response to request for information from a member of the public (including websites).
 1. These communications are still subject to the fee disclosure requirements if fees are mentioned.
 2. Communications must still be truthful and verifiable under Rule 32:7.1.
 3. With regard to websites, there was a threshold question as to whether the internet content should be distinguished from other forms of advertisement because based on the “control” of the computer users who access the information.
 - i. Rule 32:7.2 specifically states that communications by a lawyer that are in reply to a request for information by a member of the public are not subject to advertising rules, other than the requirement that the lawyer provide the appropriate fee disclosure under Rule 32:7.2(h). Information available through a hyperlink on a lawyer's Web site is expressly listed as an example of communications replying to a request for information.
 - ii. Just as in any other form of advertising or marketing, a lawyer's website should not make a false or misleading communication about the lawyer or the lawyer's services.
- b. It is permissible to advertise services “through written, recorded, or electronic communication, including public media” so long as the communication includes the name and office of the lawyer or law firm responsible for the content.
- c. Lawyers licensed to practice in Iowa and law firms may list their name, address, telephone number, and designation as lawyer in a telephone or city directory:
 1. Alphabetically in the residential, business, or classified section of a telephone or city directory.

2. Listings in the classified section must be under the "Lawyers" or "Attorneys" heading unless the lawyer or a member of the law firm is qualified under Rule 32.7.4 for a specific area of practice.
 3. Or in a display or box advertisement.
- d. Audio, television, and electronic advertisements should be in "nondramatic voice" and by a voice other than that of the lawyer. No background sound is permitted.
 - e. Television advertisements shall have no visual display "except that allowed in print as articulated by the announcer."
 - f. Records of any advertisements shall be preserved in copy for 3 years and should include the date and medium (including name of publication) of advertisement.
 - g. Information that may be conveyed to the public in a dignified manner:
 1. Name, address, telephone number, Internet address, professional designation.
 2. Description of practice: "general practice," "general practice including but not limited to...", or specialized fields so long as permitted by Rule 32.7.4.
 3. Date and place of birth.
 4. Date and place of admission to the bar.
 5. Schools attended with degrees, dates of graduation, and scholastic distinctions.
 6. Public or quasi-public offices.
 7. Military service.
 8. Legal authorships.
 9. Legal teaching positions.
 10. Memberships, offices, and committee assignments in bar associations.
 11. Memberships and offices in legal fraternities or societies.
 12. Technical and professional licenses or memberships.
 13. Foreign language ability.
 - h. Fee information may be communicated:
 1. Permissible information:

- i. Fee for initial consultation.
 - ii. Availability on request of fee schedule or estimate.
 - iii. Contingent fee rates subject to rule 32:1.5 provided disclosure of whether percentage is computed before or after deduction of costs and provided disclosure that client may be liable for court costs, etc.
 - iv. Fixed fees or range of fees for specific legal services.
 - v. Hourly fee rate.
 - vi. Whether credit cards are accepted.
2. If fixed fees or range of fees for specific legal services, mandatory disclosure in equivalent print:
- i. That stated fees only apply to clients whose matters are encompassed within the described services.
 - ii. If services are outside the described services, client is entitled to written estimate.
3. "Specific legal services" is limited to:
- i. Abstract examinations and title opinions.
 - ii. Uncontested dissolutions of marriage.
 - iii. Wills leaving all property to one beneficiary and contingently to one beneficiary or class of beneficiaries.
 - iv. Income tax returns for wage earners.
 - v. Uncontested personal bankruptcies.
 - vi. Changes of name.
 - vii. Simple residential deeds.
 - viii. Residential purchase and sale agreements.
 - ix. Residential leases.
 - x. Residential mortgages and notes.
 - xi. Powers of attorney.

xii. Bills of sale.

4. Unless otherwise noted in the advertisement, the attorney or firm is bound to the fee statements for at least 90 days after publication.
 - i. If litigation is advised, disclosure must be made that filing a claim solely to harass or coerce settlement could be illegal and create liability.
 - j. A legal aid office, public defender office, law school, nonprofit organization, bar association, military legal assistance office, lawyer referral service of a bar association, or legal services plan that satisfies the requirements of Rule 32:7.7(d)(4) may use dignified commercial publicity to advertise the availability and nature of its legal services so long as no lawyer is identified by name.
 - k. The identification of a lawyer as a lawyer and by name is not prohibited:
 1. In political advertisements when professional status is germane.
 2. In public notice when name and profession of a lawyer are required or pertinent for purpose other than attraction of potential clients.
 3. In routine reports of business, civic, professional, or political organization in which the lawyer is a director or officer.
 4. In legal documents prepared by the lawyer.
 5. In legal textbooks, treatises, and legal publications.
 6. In communication by a qualified legal assistance organization to a member or beneficiary of the organization.
 - l. A lawyer may not pay or give item of value in exchange for publicity in a news item or give information which, if published, would violate Rule 32:7.1.
 - m. Comments:
 1. Statements of fees should not mislead clients as to the true or total cost of representation. It is misleading to label an hourly charge as a "reasonable fee."
 - i. Advertising a fee for service should be undertaken with great care since appropriate inquiries may reveal the need for extra legal service. Should avoid misleading potential clients and include appropriate disclaimers.
 - ii. May carefully describe rates as "reasonable," "moderate," or "very reasonable," but not "cut rate," "special," etc.

2. All disclosures should be in 9-point type and included on an Internet site.
3. Nothing limits publication in reputable law lists that information traditionally included in those publications so long as the list or directory is intended primarily for use by legal professionals.
4. Any expansion of the current rules requires approval of application filed with the supreme court.
5. The court may modify the list of "specific legal services" by considering if the description would be deceptive, if the services can be performed using standardized forms, if only limited research may be involved, and if only a few factual circumstances actually vary.

IV. Communicating Fields of Practice or Specialization (Rule 32:7.4)

- a. A lawyer may communicate that his/her practice includes or is limited to certain fields of law. Only the fields set forth in the rule may be referenced.
- b. Applications to expand this list may be made to the Supreme Court.
 1. May include suffice "law," "lawyer," "matters," "cases," or "litigation."
- c. A lawyer admitted to practice before the U.S. Patent and Trademark Office may use the designations "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney."
- d. A lawyer in Admiralty practice may use the designations "Admiralty," "Proctor in Admiralty," or a substantially similar designation.
- e. "A lawyer should not state or imply that a lawyer is certified as a specialist in a particular field of law unless":
 1. The lawyer has been certified as a specialist by an organization approved by the Iowa Supreme Court Attorney Disciplinary Board and
 2. The name of the certifying organization is clearly identified in the communication
- f. A lawyer publicly describing his/her practice as limited to a field of law or as certified as a specialist in a field of law must:
 1. For all fields of practice designated as "practicing in..." spend the greater of 100 hours or 10 percent of the lawyer's actual practice time for the preceding year in each indicated field as well as having completed at least 10 hours of continuing legal education in the indicated field during the preceding calendar year.

2. For attorneys using the terms “practice limited to...” or “practicing primarily in...,” the greater of 400 hours or 40 percent of the lawyer’s actual practice for the preceding year must have been devoted to each indicated field of practice as well as having completed at least 15 hours of continuing legal education in the indicated field during the preceding calendar year.
 3. Prior to communicating a limited practice, the lawyer must report eligibility and compliance each year to the Commission on Continuing Legal Education.
- g. A lawyer describing his/her practice as “General practice including but not limited to” certain fields of practice descriptions does not need to comply with these requirements.
- h. Comments:
1. Lawyers who hold themselves out as “practicing in, or limiting their practice to” certain fields of law are still subject to false and misleading controls of Rule 32:7.1.
 2. Certification by an approved organization is expected to signify “an advanced degree of knowledge and experience in the law greater than is suggested by general licensure to practice law.”
 - i. Certifying organizations should apply standards of “experience, knowledge, and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable.”

IDENTIFYING AND DEALING WITH CONFLICTS OF INTEREST

II. Conflicts of Interest With Current Clients (Rule 32:1.7)

- a. A lawyer shall not represent a client if the representation involves a “concurrent conflict of interest.” This concurrent conflict of interest exists if:
 1. The representation of one client will be directly adverse to another client; or
 2. There is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
- b. Notwithstanding the existence of a CCI, a lawyer may represent a client if:

1. The lawyer reasonably believes that the lawyer will be able to provide “competent and diligent” representation to *each* affected client;
 2. The representation is not prohibited by law;
 3. The representation does not involve the assertion of a claim by one client against another client represented by the lawyer “in the same litigation or other proceeding before a tribunal;” and
 4. Each affected client give informed consent, confirmed in writing.
 - i. Informed consent: agreement by a person to a proposed course of conduct after the lawyer had communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. [Rule 32:1.0(e)]
 - ii. Confirmed in writing: informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. [Rule 32:1.0(b)]
 - iii. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. [Rule 32:1.0(b)]
 - a. Rule 32:1.0(n) states that a writing includes electronic submission like e-mail.
 - iv. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. [Rule 32:1.7 (Comment 20)]
 5. However, in no event shall a lawyer represent both parties in dissolution of marriage proceedings. [Rule 32:1.7(c)]
- c. To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine the persons and issues involved. Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this rule. [Rule 32:1.7 (Comment 3)]

- d. What happens when changes in corporate or other organizational affiliations create conflicts in the midst of representation? For example, a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. [Rule 32:1.7 (Comment 5)]
 - 1. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. The lawyer must also continue to protect the confidences of the client from whose representation the lawyer has withdrawn. [Rule 32:1.7 (Comment 5)]
- e. What happens when a lawyer has discussions concerning her own possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent? [Rule 32:1.7 (Comment 10)]
 - 1. Such discussions "could materially limit the lawyer's representation of the client." This would constitute a personal conflict of interest.
- f. What happens when lawyers representing different clients in the same or in substantially related matters are closely related by blood or marriage? [Rule 32:1.7 (Comment 11)]
 - 1. A lawyer related to another lawyer, e.g., parent, child, sibling, spouse, cohabiting partner, or lawyer related in any other familial or romantic capacity, ordinary may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. [Rule 32:1.7 (Comment 11)]
 - i. The disqualification arising from a close family relationship "is personal" and "ordinarily is not imputed to members of firms with whom the lawyers are associated." [Rule 32:1.7 (Comment 11)]
- g. A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. [Rule 32:1.8(j)]
- h. A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. [Rule 32:1.7 (Comment 13); Rule 32:1.8(f)]
 - 1. Hypothetical: You have been asked by a parent to represent the parent's 20-year-old son in a criminal defense. The parent – and not the son – is paying for the representation. With whom does the decision-making authority rest with regard to the son's representation – the parent, or the son?

2. A lawyer shall not accept compensation for representing a client from one other than the client unless: [Rule 32:1.8(f)]
 - i. The client gives informed consent;
 - ii. There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - iii. Information relating to representation of a client is kept confidential.
- i. Ordinarily, clients may consent to representation notwithstanding a conflict. Rule 32:1.7(b) spells out three types of conflicts that are nonconsentable, "meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." [Rule 32:1.7 (Comment 17)]
 1. Rule 32:1.7(c) provides a specific example of a nonconsentable conflict, i.e., where a lawyer is asked to represent both parties in a marriage dissolution proceeding.
 2. Hypothetical: Is a lawyer's multiple representation of adverse parties to a mediation nonconsentable? The Comment to Rule 32:1.7(c) suggests it might not be, because "mediation is not a proceeding before a 'tribunal' under rule 32.1.0(m)." The representation is more likely precluded by paragraph (b)(1).
- j. A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. [Rule 32:1.7 (Comment 21)]
 1. What happens if the client consenting to the conflict later changes her mind, and revokes the consent?
 - i. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectation of other clients, and whether material detriment to other clients or lawyers would result. [Rule 32:1.7 (Comment 21)]
- k. Lawyers may properly request that clients waive future conflicts in certain situations.
 1. These conflicts that might arise in the future are subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the

likelihood that the client will have the requisite understanding. [Rule 32:1.7 (Comment 22)]

2. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. [Rule 32:1.7 (Comment 22)]
1. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. [Rule 32:1.7 (Comment 24)]
 1. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. [Rule 32:1.7 (Comment 24)]
 - m. What if an attorney is representing a class of plaintiffs in a class action lawsuit, and the attorney has a conflict with one of the unnamed members of the class?
 1. Unnamed members of a class are ordinarily not considered to be clients of the lawyer for conflict of interest purposes. Thus, the lawyer does not typically need to get the consent of an unnamed class member before representing a client suing the person in an unrelated matter. [Rule 32:1.7 (Comment 25)]
 - n. What if two entrepreneurs approach you about starting a business, where there is obviously some difference in interest among the entrepreneurs?
 1. Common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, or arranging a property distribution in settlement of an estate. [Rule 32:1.7 (Comment 28)]
 2. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication, or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them. [Rule 32:1.7 (Comment 28)]

3. However, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. [Rule 32:1.7 (Comment 29)]
 4. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. [Rule 32:1.7 (Comment 29)]
 5. Continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. [Rule 32:1.7 (Comment 31)]
 6. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. [Rule 32:1.7 (Comment 31)]
- o. Does a lawyer representing a corporation, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary?
1. No. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client. [Rule 32:1.7 (Comment 34)]

III. Specific Rules Regarding Conflicts With Current Clients [Rule 32:1.8]

- a. A lawyer cannot enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless:

1. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
2. the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
3. the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
 - i. These requirements must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule also applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. [Rule 32:1.8 (Comment 1)]
 - ii. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. [Rule 32:1.8 (Comment 2)]
 - iii. The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. [Rule 32:1.8 (Comment 3)]
 - iv. Pursuant to Rule 32:1.7, the lawyer must also disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that rule 32:1.7 will preclude the lawyer from seeking the client's consent to the transaction. [Rule 32:1.8 (Comment 3)]
 - v. Caveat: If the client is independently represented in the transaction, the requirement for full disclosure is satisfied either by a written

disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client the Rule requires. [Rule 32:1.8 (Comment 4)]

b. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or otherwise required by the Rules.

1. Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. [Rule 32:1.8 (Comment 5)]

2. This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. [Rule 32:1.8 (Comment 5)]

i. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. [Rule 32:1.8 (Comment 5)]

3. The rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. [Rule 32:1.8 (Comment 5)]

c. No "substantial" gifts from clients.

1. A lawyer may not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.

i. Related persons include a spouse, child, sibling, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

ii. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. [Rule 32:1.8 (Comment 6)]

iii. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which

treats client gifts as presumptively fraudulent. [Rule 32:1.8 (Comment 6)]

- a. In any event, due to concerns about overreaching and imposition on clients, a lawyer should not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit. [Rule 32:1.8 (Comment 6)]
- iv. This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. [Rule 32:1.8 (Comment 8)]
 - a. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 32:1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. [Rule 32:1.8 (Comment 8)]
- d. No literary or media rights flowing from the representation.
 1. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
 - a. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. [Rule 32:1.8 (Comment 9)]
 - b. This Rule does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to the fee arrangement and conflicts rules. [Rule 32:1.8 (Comment 9)]
- e. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
 - i. Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. [Rule 32:1.8 (Comment 10)]
 - ii. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. [Rule 32:1.8 (Comment 10)]
- f. A lawyer shall not accept compensation for representing a client from someone other than the client unless:
 1. the client gives informed consent;
 2. there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 3. information relating to representation of a client is protected as required by rule 32:1.6.
 - i. Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. *See also* Rule 32:5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another). [Rule 32:1.8 (Comment 11)]

- ii. Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 32:1.7. The lawyer must also conform to the requirements of Rule 32:1.6 concerning confidentiality. [Rule 32:1.8 (Comment 12)]
 - iii. When the lawyer is publicly-compensated, such as in the case of a public defender in a criminal case or a guardian appointed in a civil case or when civil legal services are provided by a legal aid organization, the fee arrangement ordinarily does not pose the same risk of interference with the lawyer's independent professional judgment that exists in other contexts. [Rule 32:1.8 (Comment 12a)]
- g. Representation of multiple clients in the same matter.
- 1. A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed by the client.
 - 2. The lawyer's disclosure must include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
 - i. Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under rule 32:1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. [Rule 32:1.8 (Comment 13)]
 - ii. In addition, rule 32:1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or *nolo contendere* plea in a criminal case. The rule stated in this paragraph is a corollary of both these rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. [Rule 32:1.8 (Comment 13)]
 - iii. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members

and other procedural requirements designed to ensure adequate protection of the entire class. [Rule 32:1.8 (Comment 13)]

h. A lawyer may not:

1. make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or
2. settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

i. Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. [Rule 32:1.8 (Comment 14)]

ii. This Rule does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. [Rule 32:1.8 (Comment 14)]

iii. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. [Rule 32:1.8 (Comment 14)]

iv. Agreements settling a claim or a potential claim for malpractice are not prohibited by this rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel. [Rule 32:1.8 (Comment 15)]

i. No proprietary interests in the subject matter of the cause of action.

1. A lawyer cannot acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.

2. The lawyer may, however, acquire a lien authorized by law to secure the lawyer's fee or expenses, or contract with a client for a reasonable contingent fee in a civil case.
 - i. This Rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The comments to this Rule expressly state that it is subject to specific exceptions in case law. [Rule 32:1.8 (Comment 16)]
 - ii. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of Rule 32:1.8(a). [Rule 32:1.8 (Comment 16)]
- j. Absolutely no sex with clients, unless the client is your spouse or was your romantic partner pre-representation.
 1. A lawyer may not have sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the client-lawyer relationship.
 2. Even in these provisionally exempt relationships, the lawyer should strictly scrutinize the lawyer's behavior for any conflicts of interest to determine if any harm may result to the client or to the representation.
 3. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.
 - i. The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. [Rule 32:1.8 (Comment 17)]
 - ii. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. [Rule 32:1.8 (Comment 17)]

- iii. A blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. [Rule 32:1.8 (Comment 17)]
 - iv. Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. [Rule 32:1.8 (Comment 18)]
 - v. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. [Rule 32:1.8 (Comment 18)]
 - vi. When the client is an organization, paragraph Rule 32:1.8(j) prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.
- k. With law firms and conflicts, it's generally "all for one, one for all..."
- 1. While lawyers are associated in a firm, in general, a prohibition that applies to any one of them shall apply to all of them.
 - i. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with Rule 32:1.8(a), even if the first lawyer is not personally involved in the representation of the client.
 - ii. The personal prohibitions (set forth in Rule 32:1.8(j) and (l)), however, are personal in nature and thus are not applied to associated lawyers. [Rule 32:1.8 (Comment 19)]
- l. Conflicts through relatives.
- 1. A lawyer related to another lawyer shall not represent a client whose interests are directly adverse to a person whom the lawyer knows is represented by the related lawyer except upon the client's informed consent, confirmed in a writing signed by the client. Even if the clients' interests do not appear to be directly adverse, the lawyer should not undertake the representation of a client if there is a significant risk that the related lawyer's involvement will interfere

with the lawyer's loyalty and exercise of independent judgment, or will create a significant risk that client confidences will be revealed.

- i. For purposes of this Rule, "related lawyer" includes a parent, child, sibling, spouse, cohabiting partner, or lawyer related in any other familial or "romantic" capacity.

IV. Prospective clients (Rule 32:1.18)

- a. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
 1. Not all persons who communicate information to a lawyer are entitled to protection under this rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). [Rule 32:1.18 (Comment 2)]
- b. Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 32:1.9 would permit with respect to information of a former client.
 1. Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients. [Rule 32:1.18 (Comment 1)]
- c. A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
 1. It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. [Rule 32:1.18 (Comment 3)]

2. In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. [Rule 32:1.18 (Comment 4)]
 3. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. In any event, consent from all affected present or former clients must be obtained before accepting the representation. [Rule 32:1.18 (Comment 4)]
- d. When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
1. both the affected client and the prospective client have given informed consent, confirmed in writing, or
 2. the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - i. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - ii. written notice is promptly given to the prospective client.
 - a. A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. [Rule 32:1.18 (Comment 5)]
 - b. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client. [Rule 32:1.18 (Comment 5)]
 - c. Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter. [Rule 32:1.18 (Comment 6)]
 - d. Under paragraph (c), the prohibition in this rule is imputed to other lawyers as provided in Rule 32:1.10, but, under

paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. [Rule 32:1.18 (Comment 7)]

- e. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. [Rule 32:1.18 (Comment 7)]
- f. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified. [Rule 32:1.18 (Comment 7)]

V. Imputation of Conflicts of Interest (Rule 32:1.10)

- a. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 32:1.7 or 32:1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
 - 1. The rule of imputed disqualification gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. [Rule 32:1.10 (Comment 2)]
 - 2. This paragraph operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by rules 32:1.9(b) and 32:1.10(b). [Rule 32:1.10 (Comment 2)]
 - 3. The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. [Rule 32:1.10 (Comment 4)]
 - i. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. In addition, written notice must be

promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule. [Rule 32:1.10 (Comment 4)]

- b. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
 - 1. the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - 2. any lawyer remaining in the firm has information protected by rules 32:1.6 and 32:1.9(c) that is material to the matter.
 - i. Rule 32:1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. [Rule 32:1.10 (Comment 5)]
 - ii. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate rule 32:1.7. [Rule 32:1.10 (Comment 5)]
 - a. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by rules 32:1.6 and 32:1.9(c). [Rule 32:1.10 (Comment 5)]
- c. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 32:1.7.
- d. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 32:1.11.
 - 1. Where a lawyer has joined a private firm after having represented the government, imputation is governed by rule 32:1.11(b) and (c), not this rule. [Rule 32:1.10 (Comment 7)]
 - 2. Under rule 32:1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment, or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer. [Rule 32:1.10 (Comment 7)]

VI. Termination of the relationship (Rule 32:1.16)

- 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.
 - i. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. [Rule 32:1.16 (Comment 1)]
 - ii. 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. [Rule 32:1.16 (Comment 2)]
 - a. 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. [Rule 32:1.16 (Comment 2)]
 - iii. 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. [Rule 32:1.16 (Comment 3)]
 - iv. 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. [Rule 32:1.16 (Comment 4)]
 - v. 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. [Rule 32:1.16 (Comment 6)]

- 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.
 - 1. 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 32:1.16 (Comment 9)]