

# FEDERAL CRIMINAL LAW AND PROCEDURE SPRING 2012



Co-Sponsored by  
THE FEDERAL PUBLIC DEFENDER'S OFFICE  
AND  
THE IOWA ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS

DRAKE LAW SCHOOL LEGAL CLINIC  
DES MOINES, IOWA  
May 24, 2012

# WELCOME

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**THE  
SPRING 2012  
FEDERAL LAW AND PROCEDURE  
SEMINAR  
IS CO-SPONSORED BY  
THE FEDERAL DEFENDER'S OFFICE  
AND  
THE IOWA ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**



## **PROGRAM**

- 8:00 a.m. to 8:30 a.m.      **Registration**
- 8:30 a.m. to 9:15 a.m.      **Odds and Ends/CJA Issues**  
*James Whalen,*  
Federal Public Defender
- 9:15 a.m. to 9:45 a.m.      **Fast Track and Other Plea Agreement Issues**  
*Andy Kahl,* Assistant U.S. Attorney
- 9:45 a.m. to 10:00 a.m.      **BREAK**
- 10:00 a.m. to 10:45 a.m.      **Discovery - Panel Discussion**  
*Andy Kahl,* Assistant U.S. Attorney,  
*Tim Ross-Boon, Jane Kelly,* Asst. Federal Public Defenders  
*Angela Campbell,* CJA Panel Attorney
- 10:45 a.m. to 11:45 a.m.      **Sentencing Videos**  
*Joe Herrold,* Assistant Federal Public Defender
- 11:45 a.m. to 1:00 p.m.      **LUNCH (On your own)**
- 1:00 p.m. to 2:00 p.m.      **Supreme Ct. & 8<sup>th</sup> Cir. Update**  
*John Messina,* Research & Writing Attorney  
Federal Public Defender's Office
- 2:00 p.m. to 3:00 p.m.      **Evidence**  
*Laurie Doré,* Professor  
Drake Legal Clinic
- 3:00 p.m. to 3:15 p.m.      **BREAK**
- 3:15 p.m. to 4:15 p.m.      **Ethics**  
*Trinity Braun-Arana,*  
Assistant Director for Boards and Commissions

# FEDERAL CRIMINAL LAW AND PROCEDURE

*Drake Legal Clinic*

*Des Moines, Iowa*

*May 24, 2012*

This seminar has been submitted for approval for accreditation under the regulations of the Iowa Supreme Court Commission on Continuing Legal Education. It is planned that this program will provide up to a maximum of 6 hours of credit, with one hour of ethics credit, towards the mandatory continuing legal education requirements under the Iowa Rules.



This seminar has been submitted for approval for accreditation for 6 hours of federal continuing legal education credit with one hour of ethics.



The seminar is also accredited under the Amended Criminal Justice Act Plan for the Southern and Northern Districts of Iowa and will provide 6 hours of credit toward the mandatory continuing legal education requirement under the CJA Plan.

**SPEAKER  
BIOGRAPHICAL  
INFORMATION**

## **TRINITY BRAUN-ARANA**

EDUCATION: J.D., University of Iowa (1999); B.A., Iowa State University

PROFESSIONAL: Currently Assistant Director for Boards and Commissions at the Office of Professional Regulation. Prior to joining the Office of Professional Regulation, worked as a sole practitioner in Des Moines for 8 years.

## **ANGELA CAMPBELL**

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

PROFESSIONAL: Managing Member, Dickey & Campbell Law Firm, PLC (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)

## **LAURIE DORÉ**

EDUCATION: J.D., Southern Methodist University School of Law (1984); B.A., Creighton University (1981)

PROFESSIONAL: Ellis & Nelle Levitt Distinguished Professor of Law, Drake University Law School

- Courses taught: Evidence, Civil Procedure, Conflict of Laws
- Author: Iowa Practice - Evidence (West 2009 - present)
- On Drake Faculty since 1992

## **JOE HERROLD**

EDUCATION: J.D., Drake University Law School (2006); B.A., Grinnell College (2003)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2008-Present); Law Clerk for the Honorable Robert W. Pratt, U.S. District Court for Southern District of Iowa (2006-2008).

## **ANDREW KAHL**

EDUCATION: J.D., New York University (1989); B.A., College of William and Mary in Virginia (1986)

PROFESSIONAL:

(1997-present) U.S. Attorney's Office, S.D. Iowa;  
(2010-present) (2005-2008), Criminal Chief; various other collateral duties in the past, including Professional Responsibility Officer, Appellate Coordinator, Financial Institution Fraud Coordinator, etc.;  
(1991-1997) U.S. Dept. Of Justice, Tax Division, Criminal Section, Trial Attorney;

(1990-1991) Law Clerk, U.S. District Court, N.D. of Ohio;  
(1989-1990) Law Clerk, Alaska Court of Appeals.

### **JANE KELLY**

EDUCATION: J.D., Harvard Law School (1991); A.B., Duke University, (1987)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (1994-Present); Visiting Instructor, University of Illinois College of Law (1993-1994); Law Clerk to the Honorable David R. Hansen, U.S. Circuit Judge, Eighth Circuit Court of Appeals (1992-1993); Law Clerk to the Honorable Donald J. Porter, U.S. District Judge, District of South Dakota (1991-1992)

### **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).

### **TIM 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).

### **JIM WHALEN**

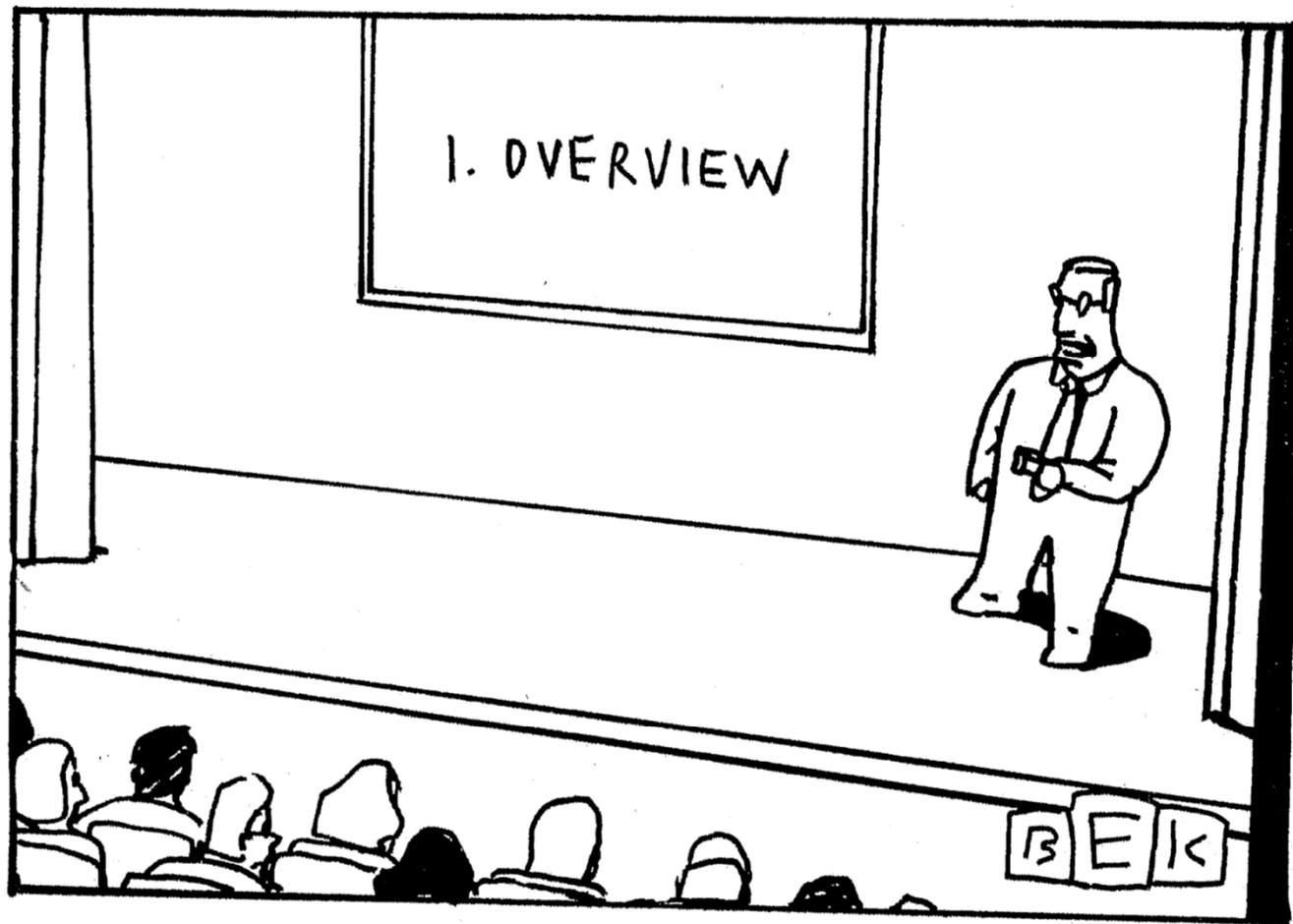
EDUCATION: J.D., University of Iowa (1978); B.A., University of Iowa (1974)

PROFESSIONAL: Federal Public Defender, Southern District of Iowa (2012-Present); Assistant Federal Public Defender, Southern District of Iowa (1994-2012); Polk County Public Defender's Office (1989-1994); State Appellate Defender's Office (1987-1989); Private Practice, Waterloo, Iowa (1978-1986).

# **ODDS AND ENDS**

**PRESENTED BY**

**JIM WHALEN**  
**FEDERAL PUBLIC DEFENDER**



*"First, I want to give you an overview of what I will tell you over and over again during the entire presentation."*



# Odds & Ends

- **New PSR Interview Questions**
  - Focus on Selective Service Status
  - To “assist with the supervision of the offender while on supervised release.”
  - Questions incorporated “suggestions based on our risk assessment tools and relevant supervision issues.”

## New PSR Interview Questions

### Residential

- What influenced you to move \_\_\_ number of times?

### Personal History

- Was there any major/traumatic event in your childhood that impacted you?

### Marital History/Children

- How would you describe your relationship with your significant other?
- Describe any domestic issues between you and your spouse.
- What is your future plan regarding family or child care?

### Social activities

- With whom do you spend most of your time?
- Who are your friends? Do they have criminal histories?
- What do you do in your free time?
- Are you involved in any clubs or organizations?
- Do you have any religious affiliations or are you involved any religious/church organizations?

### Gang

- Have you ever been a member of a gang, hate group, or biker club?
- Why did you join? When were you involved?
- Did you have any rank or duties?
- Were you initiated in?
- Do you have any gang related tattoos?



### **Physical Health**

- Do you have any allergies?
- Are you currently taking any medication? (Name, reason, dosage, prescribing physician)
- Are you suffering from a life threatening disease?

### **Mental and Emotional Health**

- How would you describe your overall mental health?
- Has a close friend or family member ever expressed concern regarding your mental well-being?
- In what ways have your mental health problems affected your life?
- What have you learned from mental health treatment so far? What have you changed as a result from treatment?
- What do you need to do to maintain your emotional health?

### **Military**

- Have you registered with the Federal selective service?

### **Substance Abuse**

- Have you ever used synthetic drugs?
- How were you introduced to alcohol/drugs?
- How has your use of alcohol/drugs impacted your relationship with significant others?
- Has a significant other ever expressed concern regarding your drug/alcohol abuse?
- Have you ever missed school or work because of your drug use?
- Have you ever neglected your children or household duties because of drug or alcohol use? How often?
- If applicable, why did you return to abusing drugs/alcohol?
- What do you think are your biggest triggers for drug/alcohol use? How will you avoid/manage triggers?
- Do you think you would benefit from substance abuse treatment in the future?



### **Education and Vocational Skills**

- What kinds of difficulties have you experienced in school? How were those difficulties addressed?
- Tell me about the circumstances that contributed to you not finishing school.
- Describe any incidents when you were suspended or expelled.
- Are you interested in any schooling/vocational training?
- Describe any martial arts, firearms, or weapons training.

### **Employment**

- Describe your future employment goals/plans.
- How did you manage to support yourself during periods of unemployment?

### **End Summary:**

- If you are sentenced to term of imprisonment, what will you hope to focus on while in custody?
- Other than your current legal issues, do you think you have any problems or concerns in your life right now?
- With whom do you intend to reside upon your release from imprisonment and what would they say about that?
- What do you think has to change in order for you to avoid additional legal trouble?



## Family Interview questions

- How did you find out about the arrest?
- How would you describe the defendant?
- How would you describe your relationship?
- What is the status of your relationship?
- What has been the impact of the offense upon your relationship? The family?
- If the defendant is incarcerated, upon release, will you be willing to have him/her return to the family home?
- Have you been/are you aware of any substance abuse by the defendant?
- Mental health issues?
- Any history of violence in the home?
- Physical health problems?
- Do you know what the defendant's substance abuse triggers are?
- What do you know of the defendant's financial condition?
- How has the offense affected the family's finances?
- If the defendant is incarcerated, will the family be able to remain in the current residence/maintain the current lifestyle? If not, what plans have been made?
- If there anything else you would like to the Court to know about the defendant?

# CJA 21 – OLD FORM

CJA 21 AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES (Rev. 04/11)

1. CIR./DIST./DIV. CODE		2. PERSON REPRESENTED			VOUCHER NUMBER	
3. MAG. DKT./DEF. NUMBER		4. DIST. DKT./DEF. NUMBER		5. APPEALS DKT./DEF. NUMBER		6. OTHER DKT. NUMBER
7. IN CASE/MATTER OF (Case Name)		8. PAYMENT CATEGORY <input type="checkbox"/> Felony <input type="checkbox"/> Petty Offense <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Other <input type="checkbox"/> Appeal		9. TYPE PERSON REPRESENTED <input type="checkbox"/> Adult Defendant <input type="checkbox"/> Appellant <input type="checkbox"/> Juvenile Defendant <input type="checkbox"/> Appellee <input type="checkbox"/> Other		10. REPRESENTATION TYPE (See Instructions)
11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) <i>If more than one offense, list (up to five) major offenses charged, according to severity of offense.</i>						
<b>REQUEST AND AUTHORIZATION FOR EXPERT SERVICES</b>						
12. ATTORNEY'S STATEMENT As the attorney for the person represented, who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request: <input type="checkbox"/> Authorization to obtain the service. Estimated Compensation and Expenses \$ _____ OR <input type="checkbox"/> Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act. (Note: Prior authorization should be obtained for services in excess of \$800, excluding expenses) Signature of Attorney _____ Date _____ <input type="checkbox"/> Panel Attorney <input type="checkbox"/> Retained Attorney <input type="checkbox"/> Pro-Se <input type="checkbox"/> Legal Organization ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix), AND MAILING ADDRESS _____ Telephone Number: _____						
13. DESCRIPTION OF AND JUSTIFICATION FOR SERVICES (See Instructions)				14. TYPE OF SERVICE PROVIDER (See Instructions)		
15. COURT ORDER Financial eligibility of the person represented having been established to the Court's satisfaction, the authorization requested in Item 12 is hereby granted. Signature of Presiding Judge or By Order of the Court _____ Date of Order _____ Nunc Pro Tunc Date _____ Repayment or partial repayment ordered from the person represented for this service at time of authorization <input type="checkbox"/> YES <input type="checkbox"/> NO				01 <input type="checkbox"/> Investigator 17 <input type="checkbox"/> Hair/Fiber Expert 02 <input type="checkbox"/> Interpreter/Translator 18 <input type="checkbox"/> Computer (Hardware/Software/Systems) 03 <input type="checkbox"/> Psychologist 19 <input type="checkbox"/> Paralegal Services 04 <input type="checkbox"/> Psychiatrist 20 <input type="checkbox"/> Legal Analyst/Consultant 05 <input type="checkbox"/> Polygraph 21 <input type="checkbox"/> Jury Consultant 06 <input type="checkbox"/> Documents Examiner 22 <input type="checkbox"/> Mitigation Specialist 07 <input type="checkbox"/> Fingerprint Analyst 23 <input type="checkbox"/> Duplication Services 08 <input type="checkbox"/> Accountant 24 <input type="checkbox"/> Other (Specify) 09 <input type="checkbox"/> CALR (Westlaw/Lexis, etc.) 10 <input type="checkbox"/> Chemist/Toxicologist 11 <input type="checkbox"/> Ballistics 25 <input type="checkbox"/> Litigation Support Services 12 <input type="checkbox"/> Weapons/Firearms/Explosive Expert 13 <input type="checkbox"/> Pathologist/Medical Examiner 26 <input type="checkbox"/> Computer Forensics Expert 14 <input type="checkbox"/> Other Medical 15 <input type="checkbox"/> Other Medical 16 <input type="checkbox"/> Voice/Audio Analyst		
<b>CLAIM FOR SERVICES AND EXPENSES</b>				<b>FOR COURT USE ONLY</b>		
16. SERVICES AND EXPENSES (Attach itemization of services with dates)		AMOUNT CLAIMED		MATH/TECHNICAL ADJUSTED AMOUNT	ADDITIONAL REVIEW	
a. Compensation						
b. Travel Expenses (lodging, parking, meals, mileage, etc.)						
c. Other Expenses						
<b>GRAND TOTALS (CLAIMED AND ADJUSTED):</b>		<b>\$0.00</b>		<b>\$0.00</b>		
17. PAYEE'S NAME AND MAILING ADDRESS _____ TIN: _____ Telephone Number: _____ CLAIMANT'S CERTIFICATION FOR PERIOD OF SERVICE FROM _____ TO _____ CLAIM STATUS <input type="checkbox"/> Final Payment <input type="checkbox"/> Interim Payment Number _____ <input type="checkbox"/> Supplemental Payment I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment (compensation or anything of value) from any other source for these services. Signature of Claimant/Payee _____ Date _____						
18. CERTIFICATION OF ATTORNEY I hereby certify that the services were rendered for this case. Signature of Attorney _____ Date _____						
<b>APPROVED FOR PAYMENT — COURT USE ONLY</b>						
19. TOTAL COMPENSATION		20. TRAVEL EXPENSES		21. OTHER EXPENSES		22. TOTAL AMOUNT APPROVED/CERTIFIED \$0.00
23. <input type="checkbox"/> Either the cost (excluding expenses) of these services does not exceed \$800, or prior authorization was obtained. <input type="checkbox"/> Prior authorization was not obtained, but in the interest of justice the Court finds that timely procurement of these necessary services could not await prior authorization, even though the cost (excluding expenses) exceeds \$800. Signature of Presiding Judge _____ Date _____ Judge Code _____						
24. TOTAL COMPENSATION		25. TRAVEL EXPENSES		26. OTHER EXPENSES		27. TOTAL AMOUNT APPROVED \$0.00
28. PAYMENT APPROVED IN EXCESS OF THE STATUTORY THRESHOLD UNDER 18 U.S.C. § 3006A(e)(3) Signature of Chief Judge, Court of Appeals (or Delegate) _____ Date _____ Judge Code _____						

# CJA 21 – New Form

CJA 21 AUTHORIZATION AND VOUCHER FOR EXPERT AND OTHER SERVICES (Rev. 05/12)

1. CIR./DIST./ DIV. CODE		2. PERSON REPRESENTED		VOUCHER NUMBER	
3. MAG. DKT./DEF. NUMBER		4. DIST. DKT./DEF. NUMBER		5. APPEALS DKT./DEF. NUMBER	
6. OTHER DKT. NUMBER		7. IN CASE/MATTER OF (Case Name)		8. PAYMENT CATEGORY <input type="checkbox"/> Felony <input type="checkbox"/> Petty Offense <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Other <input type="checkbox"/> Appeal	
9. TYPE PERSON REPRESENTED <input type="checkbox"/> Adult Defendant <input type="checkbox"/> Appellant <input type="checkbox"/> Juvenile Defendant <input type="checkbox"/> Appellee <input type="checkbox"/> Other		10. REPRESENTATION TYPE (See Instructions)			
11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) <i>If more than one offense, list (up to five) major offenses charged, according to severity of offense.</i>					
<b>REQUEST AND AUTHORIZATION FOR EXPERT SERVICES</b>					
12. ATTORNEY'S STATEMENT As the attorney for the person represented, who is named above, I hereby affirm that the services requested are necessary for adequate representation. I hereby request: <input type="checkbox"/> Authorization to obtain the service. Estimated Compensation and Expenses: \$ _____ OR <input type="checkbox"/> Approval of services already obtained to be paid for by the United States pursuant to the Criminal Justice Act. (Note: Prior authorization should be obtained for services in excess of \$800, excluding expenses) Signature of Attorney _____ Date _____ <input type="checkbox"/> Panel Attorney <input type="checkbox"/> Retained Attorney <input type="checkbox"/> Pro-Se <input type="checkbox"/> Legal Organization ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix), AND MAILING ADDRESS _____ Telephone Number: _____					
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<b>CLAIM FOR SERVICES AND EXPENSES</b>			<b>FOR COURT USE ONLY</b>		
16. SERVICES AND EXPENSES (Attach itemization of services with dates)		AMOUNT CLAIMED	MATH/TECHNICAL ADJUSTED AMOUNT	ADDITIONAL REVIEW	
a. Compensation					
b. Travel Expenses (lodging, parking, meals, mileage, etc.)					
c. Other Expenses					
<b>GRAND TOTALS (CLAIMED AND ADJUSTED):</b>					
17. PAYEE'S NAME AND MAILING ADDRESS _____ TIN: _____ Telephone Number: _____ CLAIMANT'S CERTIFICATION FOR PERIOD OF SERVICE FROM _____ TO _____ CLAIM STATUS <input type="checkbox"/> Final Payment <input type="checkbox"/> Interim Payment Number _____ <input type="checkbox"/> Supplemental Payment I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment (compensation or anything of value) from any other source for these services. Signature of Claimant/Payee _____ Date _____					
18. CERTIFICATION OF ATTORNEY I hereby certify that the services were rendered for this case. Signature of Attorney _____ Date _____					
<b>APPROVED FOR PAYMENT — COURT USE ONLY</b>					
19. TOTAL COMPENSATION		20. TRAVEL EXPENSES		21. OTHER EXPENSES	
				22. TOTAL AMOUNT APPROVED/CERTIFIED	
23. <input type="checkbox"/> Either the total cost (excluding expenses) of all services combined does not exceed \$800, or prior authorization was obtained. <input type="checkbox"/> Prior authorization was not obtained, but in the interest of justice the Court finds that timely procurement of these necessary services could not await prior authorization, even though the cost (excluding expenses) exceeds \$800. Signature of Presiding Judge _____ Date _____ Judge Code _____					
24. TOTAL COMPENSATION		25. TRAVEL EXPENSES		26. OTHER EXPENSES	
				27. TOTAL AMOUNT APPROVED	
28. PAYMENT APPROVED IN EXCESS OF THE STATUTORY THRESHOLD UNDER 18 U.S.C. § 3006A(e)(3) Signature of Chief Judge, Court of Appeals (or Delegate) _____ Date _____ Judge Code _____					

# Proposed Guideline Amendments 2012



# Mortgage Fraud - 2B1.1

- App. N. (3)(E)(iii): Fair market value of collateral at time guilt established (plea, trial, etc.)
- May use most recent tax assessment to determine fair market value
- App. N. (3)(F)(ix): Fraudulent inflation / deflation in value of publicly traded securities – new way of calculating.
- App. N. (12)(v): Addresses government bailouts as a factor in determining whether soundness of financial institution was substantially jeopardized.



## Insider Trading - 2B1.4

- If offense level is less than 12/14, increase to level 14.
- App. N. (1) defines “sophisticated insider trading” & outlines factors court can consider in determining whether it was an organized scheme to engage in insider trading.
- App. N. 3: Application of 3B1.3 (abuse of position of trust) should be applied to position that regularly participates in creating, issuing, buying, selling, or trading securities/commodities.

## 2DI.1

- App. N. (1)(D): 2DI.1: 1 gm of  
N-Benzylpiperazine = 100 gm marijuana



## Safety Valve – 2D1.11

- Distributing, importing, exporting or possessing a listed chemical; attempt or conspiracy: if defendant meets criteria on limitation on applicable of statutory minimum – decrease by 2 levels.
- App. N. (9). If (b)(6) applies, then 5C1.2(b) does not apply.



## Unlawfully Entering U.S. - 2L1.2

- App. N. Definition(B)(vii): Sentence length includes imprisonment given upon revocation of probation, parole, or S.R. only if revocation occurred before defendant was deported or unlawfully remained in U.S.



## Serious Human Rights Offense - 3A1.5

- Conviction under 18 U.S.C. 1091(c), increase 2 levels.
- Conviction any other serious human rights offense, increase 4 levels. If death resulted & offense level less than 37 – increase to 37.
- App. Notes: defines serious human rights offense.
- Application of minimum offense level is cumulative with any other guideline provision.



# Serious Human Rights Offense

## 2L2.2

- (b)(4)(A): If offense committed to conceal membership in military, etc. – increase 2 levels. If resulting offense level less than 13 – increase to 13.
- (b)(4)(B): If offense committed to conceal participation in genocide – increase 6 levels, or any other serious human rights offense – increase 10 levels. If resulting offense level is less than 25 – increase to 25.



## Driving While Intoxicated - 4A1.2

- App. N. 5: Convictions for driving while intoxicated or under the influence are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of 4A1.2(c) do not apply.



# Multiple Counts - 5G1.2

- (b): For all counts not covered by subsection (a), court determines total punishment and impose total punishment on each count, except to the extent otherwise required by law.
- App. N. Where statutory mandatory minimum is greater than maximum of guideline range, the statutory mandatory minimum sentence shall be the guideline sentence on all counts.
- Where statutory mandatory maximum is less than minimum of guideline range, the sentence shall not be greater than the statutory maximum sentence on that count.
- Resentencing: where statutory mandatory minimum is in effect, but no longer applies, the guideline range for remaining counts determined without regard to the previous statutory mandatory minimum sentence.



## Misc.

- 2PI.2 – Providing/Possessing Contraband in Prison: (a)(3): added mobile phone or similar device

**THE FOLLOWING  
MATERIALS WERE PROVIDED  
BY  
LAURA MATE,  
SENTENCING RESOURCE COUNSEL  
PROJECT**

## **Summary of 2012 Proposed Amendment to the Sentencing Guidelines**

### **Sentencing Resource Counsel Project**

On April 13, 2012, the Sentencing Commission voted to promulgate amendments to the guidelines. These amendments will be submitted to Congress by May 1, 2012. Barring congressional action, they will take effect November 1, 2012. This memo contains a brief summary of the most relevant changes. Please be sure to read the actual language of the proposed amendments available on the Commission's website at:

[http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Newsroom/Press\\_Releases/20120413\\_UNOFFICIAL\\_RFP\\_Amendments.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20120413_UNOFFICIAL_RFP_Amendments.pdf).

- 1. Safety valve for chemical precursors:** The Commission created a safety valve provision in the guideline for chemical precursors, §2D1.11, that parallels the safety valve provision in the drug guideline. Listed chemical offenses will now be eligible for a 2-level decrease if safety valve criteria are met. The Commission announced it will *not* consider retroactive application of this provision.
- 2. BZP assigned a marijuana equivalency:** Courts had been all over the map on how to handle BZP in the drug table, so the Commission took it up this cycle. The Commission adopted the ratio Defenders supported: 1 gm BZP = 100 gm marijuana. In doing this, the Commission rightly rejected the unduly punitive ratio DOJ sought.
- 3. Favorable change in calculation of drug trafficking predicates in illegal reentry cases:** The Commission adopted our suggested approach (along the lines of the 5th, 7th, 10th and 11th circuits), that a revocation sentence imposed *after* a defendant's deportation is *not included* in the "sentence imposed" for purposes of 2L1.2(b)(1). This is particularly good news in the Second circuit which had taken a different view. The bad news, however, is that the Commission announced it will *not* consider retroactive application of this provision.
- 4. Post-Sentencing Rehabilitation in §5K2.19 expunged:** Again consistent with the Defenders' proposal, the Commission deleted §5K2.19 which provided that post-sentencing rehabilitative efforts are "not an appropriate basis for a downward departure when resentencing the defendant for that offense."
- 5. Fraud:** Responding to directives from Congress to "review and, *if appropriate*, amend" the guidelines, the Commission made several changes to the fraud guideline, which only serve to further complicate an already overly complex guideline:
  - a. Mortgage Fraud – new rules:** The Commission decided to create not only a (very) special rule, but also change an existing one. Specifically, the Commission

added a special rule for credit against loss where the collateral has *not* been disposed of at the time of sentencing. With this amendment to Application Note 3(E) to §2B1.1, in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, two new rules apply (1) use the fair market value as of the date of plea or verdict (this is a change from the old rule which used date of sentencing); and (2) there is a rebuttable presumption that the most recent tax assessment value is a reasonable estimate of the fair market value (cannot think of another instance where the Commission instructed courts on how to value something as region and case-specific as real estate). Acknowledging that tax assessments are not a perfect measure, the Commission invites courts to consider factors such as: “the recency of the tax assessment and the extent to which the jurisdiction’s tax assessment practices reflect factors not relevant to fair market value.” Let the litigation begin.

- b. Securities Fraud – a rebuttable special rule for calculating loss:** The Commission decided to weigh in on the method a court should use when calculating actual loss in a securities fraud case. It selected the “modified recissory method” to determine actual loss (that is, the difference between the average price during fraud and the average price during the 90-day period after fraud disclosure, multiplied by number of shares). While the resulting figure is now the presumptive actual loss, it is also subject to rebuttal. There is helpful language that in assessing whether this figure is a reasonable loss amount, it may consider factors such as external market forces having nothing to do with the fraud.
- c. Insider Trading (§2B1.4) Enhancements:** The Commission made two changes related to insider trading. First it added a new specific offense characteristic providing a floor offense level of 14 “if the offense involved an organized scheme to engage in insider trading” and new commentary on factors that may be considered in deciding whether to apply this new SOC. It also broadened the application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) in insider trading cases.
- d. Financial Institution Fraud – government bailout won’t save you from a sentencing enhancement:** The Commission broadened the application of §2B1.1(b)(15)(B) which provides a 4-level enhancement for specific financial harms such as jeopardizing a financial institution. The Commission amended Application Note 12 to indicate the enhancement may apply even if the offense did not cause the enumerated harm, so long as the harm “was likely to result

from the offense but did not result from the offense because of federal government intervention, such as a ‘bailout’.”

- e. **Downward Departure – example added:** The Commission added an example to the downward departure provision for cases where the offense level substantially overstates the seriousness of the offense. The new language is as follows: “a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims.”
  - f. **Upward Departure – example added:** The Commission likewise added an example to the upward departure provision for an offense that “created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).” The example is: “such as a risk of a significant disruption of a national financial market.”
6. **Multiple counts (5G1.2) with mandatory minimum:** Over opposition from Defenders, the Commission rejected the approach taken by the Ninth and D.C. circuits and amended §5G1.2 to provide that when any count in a multiple-count case involves a mandatory minimum sentence that affects the otherwise applicable guideline range, the effect on the guideline range applies to all counts.<sup>1</sup> As evidence that the Commission opted for the more complicated approach, the Commission had to add a “special rule on resentencing” to address the situation where a defendant successfully appeals a case such that the mandatory minimum sentence no longer applies. Under the special rule, courts are directed that the guideline range for the remaining counts shall be “redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.”
7. **Human Rights and New SOC for Immigration Fraud that involves uncharged human rights offenses:** Although there has only been one prosecution in the United States for a serious human rights offense as defined by the Commission, the Commission created a new Chapter Three adjustment, §3A1.5, adding enhancements from 2-4 levels, and setting a floor of level 37 for most serious human rights offenses. The Commission also added new enhancements for immigration and naturalization fraud offenses sentenced under §2L2.2. Under the new amendments, if the defendant committed the charged

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<sup>1</sup> The Commission takes the position that it is adopting the holding of the Fifth Circuit. As explained in Defender comments (available at [www.fd.org](http://www.fd.org)), however, the Commission misconstrues a casual statement in a Fifth Circuit opinion about the appropriate sentence on remand as a “holding” about the application of §5G1.2(b).

fraud “to conceal” participation in a human rights offense, the offense level is increased by 6-10 levels, depending on the offense, and has a floor of level 25. In addition, a 2-level increase and floor of level 13 applies if the defendant committed the fraud “to conceal the defendant’s membership in, or authority over, a military, paramilitary, or police organization that was involved in a serious human rights offense.”

- 8. Driving While Intoxicated always counts for criminal history:** The Commission amended Application Note 5 in §4A1.2 to make clear that contrary to the interpretation by the 2nd circuit, and consistent with the interpretation of the 7th and 8th circuits, a defendant’s prior sentence for driving while intoxicated or under the influence is *always* counted toward the defendant’s criminal history score, regardless of how it is classified (felony, misdemeanor or petty offense).
- 9. Cell phones in prison:** The Cell Phone Contraband Act, which amended 18 U.S.C. §1791, made it a class A misdemeanor to provide a mobile phone to an inmate, or for an inmate to possess one. The Commission amended §2P1.2 to assign mobile phones and similar devices a base offense level of 6. (This is much better than the other option the Commission was considering which would have set a BOL of 13 for this offense, thereby equating a cell phone with a weapon.)
- 10. Prevent All Cigarette Trafficking Act (PACT):** The PACT Act imposes strict restrictions on the ‘delivery sale’ of cigarettes and smokeless tobacco. The Commission amended Appendix A to reference violations of the act under 15 U.S.C. § 377 to §2T2.1 (Non-Payment of Taxes) and §2T2.2 (Regulatory Offenses), and amended commentary in both of those provisions to indicate that §2T2.1 applies if the conduct constitutes non-payment, evasion, or attempted evasion of taxes, and §2T2.2 applies if the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. The PACT Act also created a new Class A misdemeanor at 18 U.S.C. § 1716E for shipping cigarettes through the mail. The Commission amended Appendix A to reference those violations to §2T2.2.
- 11. Animal Crush Videos:** The Commission amended Appendix A to reference the crime of creating or distributing an animal crush video under 18 U.S.C § 48 to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names).
- 12. Indian Arts and Crafts:** The Commission amended Appendix A to reference offenses under 18 U.S.C. § 1159 (Misrepresentation of Indian produced goods and services) to §2B1.1. The Commission also amended Appendix A to reference offenses under 18

U.S.C. § 1158 (Counterfeiting Indian Arts and Crafts Board trade mark) to both §2B1.1 and §2B5.3 (Criminal Infringement of Copyright or Trademark).

**Notably Absent from the Amendment List**

Despite publishing several options for “burglary of a non-dwelling” and “categorical approach to priors,” the Commission made no changes. The Commission made clear, however, that these issues are on the front burner for next year. In light of this, if anyone has any specific issues in these two areas you would like to bring to SRC’s attention, we encourage you to do so.

**FAST TRACK  
and  
OTHER  
PLEA AGREEMENT  
ISSUES**

**PRESENTED BY**

**ANDY KAHL  
ASSISTANT U.S. ATTORNEY**

Andrew H. Kahl

Chief, Criminal Division

U.S. Attorney's Office – S.D. Iowa (Des Moines) – 515-473-9300

**Plea Agreements, Fast Track, and Discovery**

1. Department of Justice Policy on Fast Track (pp. 2-5)
2. S.D. Iowa Model Fast Track Plea Agreement (pp. 6-18)
3. BNA Article re: *Lafler* and *Frye* (pp. 19-22)
4. Letters from USAO and FPD re: *Lafler/Frye* in the S.D. Iowa (pp. 23-26)
5. Fed. R. Crim. P. 11 (pp. 27-30)
6. In re: Bragg (W.D. Va., Feb. 21, 2012) (pp. 31-34)
7. S.D. Iowa Form Discovery Agreement (pp. 35-41)
8. *Missouri v. Frye*, U.S. Supreme Court (March 21, 2012) (pp. 42-50)
9. *Lafler v. Cooper*, U.S. Supreme Court (March 21, 2012) (pp. 51-63)



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 31, 2012

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole  
Deputy Attorney General

SUBJECT: Department Policy on Early Disposition or "Fast-Track" Programs

**I. INTRODUCTION**

In the 1990s, United States Attorneys' Offices and the Department developed early disposition or "fast-track" programs as a matter of prosecutorial discretion to handle increasingly large numbers of criminal immigration cases arising along the southwestern border of the United States. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act"), Pub. L. No. 108-066, 117 Stat. 650, Apr. 30, 2003, harmonized these programs with the departure provisions of the federal Sentencing Guidelines. More specifically, the PROTECT Act directed the Sentencing Commission to promulgate a statement by October 27, 2003, authorizing downward sentence departures of no more than four levels as part of an early disposition program authorized by the Attorney General and the United States Attorney. See Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).<sup>1</sup>

This memorandum sets forth the revised policy and criteria for fast-track programs. It provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal, nor does it place any limitations on otherwise lawful litigative prerogatives of the Department.

**II. REVISED FAST-TRACK POLICIES**

As stated above, fast-track programs originated in southwestern border districts with an exceptional volume of immigration cases. They are based on the premise that a defendant who promptly agrees to participate in such a program saves the government significant and scarce resources that can be used to prosecute other defendants, and that a defendant who receives a fast-track departure has demonstrated an acceptance of responsibility above and beyond what is already taken into account by the adjustments contained in the Sentencing Guidelines. In that context, these programs address a compelling, and otherwise potentially intractable, resource issue. Indeed, the need for fast-track programs has persisted and, in some districts, intensified.

<sup>1</sup> The requirement that a fast-track program be approved by the Attorney General can be satisfied by obtaining the approval of the Deputy Attorney General. See 28 U.S.C. § 510; 28 C.F.R. § 0.15(a).

On September 22, 2003, then-Attorney General Ashcroft issued a memorandum setting forth the criteria to be used by United States Attorneys’ offices (USAOs) seeking to establish fast-track programs.<sup>2</sup> Since this memorandum was issued, the legal and operational circumstances surrounding fast-track programs have changed. Fast-track programs are no longer limited to the southwestern border districts; rather, some, but not all, non-border districts have sought and received authorization to implement fast-track programs. The existence of these programs in some, but not all, districts has generated a concern that defendants are being treated differently depending on where in the United States they are charged and sentenced.

In addition, the Sentencing Guidelines are no longer mandatory,<sup>3</sup> and federal courts of appeals are divided on whether a sentencing court in a non-fast-track district may vary downwards from the Guidelines range to reflect disparities with defendants who are eligible to receive a fast-track sentencing discount.<sup>4</sup> Because of this circuit conflict, USAOs in non-fast-track districts routinely face motions for variances based on fast-track programs in other districts. Courts that grant such variances are left to impose sentences that introduce additional sentencing disparities.

In light of these circumstances, the Department conducted an internal review of authorized fast-track programs. After consultation with the United States Attorneys in both affected and non-affected districts, the Department is revising its fast-track policy and establishing uniform, baseline eligibility requirements for any defendant who qualifies for fast-track treatment, regardless of where that defendant is prosecuted. This outcome is consistent with the Department’s position on the Sentencing Guidelines as a means to achieve reasonable sentencing uniformity, and with Attorney General Holder’s memorandum on charging and sentencing, which states that persons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly.<sup>5</sup> This policy does not, however, alter the criteria for prosecutorial discretion on whether to charge a particular defendant, nor does it require prosecuting additional cases.

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<sup>2</sup> Memorandum from Attorney General John Ashcroft, *Department Principles for Implementing an Expedited Disposition or “Fast-Track” Prosecution Program in a District* (Sept. 22, 2003), available at <http://10.173.2.12/jmd/lib/memo3.pdf>.

<sup>3</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>4</sup> Compare *United States v. Gonzales-Zotelo*, 556 F.3d 736, 740-41 (9th Cir. 2009); *United States v. Vega-Castillo*, 540 F.3d 1235, 1238-39 (11th Cir. 2008); *United States v. Gomez-Herrera*, 523 F.3d 554, 559-64 (5th Cir. 2008) (holding that sentencing disparity resulting from fast-track programs is not “unwarranted”) with *United States v. Lopez-Macias*, – F.3d –, 2011 WL 5310622 (10th Cir.); *United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011); *United States v. Reyes-Hernandez*, 624 F.3d 405, 417-18 (7th Cir. 2010); *United States v. Camacho-Arellano*, 614 F.3d 244, 249-50 (6th Cir. 2010); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 149-56 (3d Cir. 2009); *United States v. Rodriguez*, 527 F.3d 221, 226-31 (1st Cir. 2008) (holding that sentencing courts can consider the disparity created by fast-track programs).

<sup>5</sup> Memorandum from Attorney General Eric H. Holder, Jr., *Department Policy on Charging and Sentencing* (May 19, 2010). This memorandum notes that it does not “impact the guidance provided in the September 22, 2003 memorandum and elsewhere regarding ‘fast-track’ programs. In those districts where an approved ‘fast-track’ program has been established, charging decisions and disposition of charges must comply with the Department’s requirements for that program.” Pursuant to today’s memorandum, the guidance provided in the September 22, 2003 memorandum regarding fast-track programs is superseded.

### III. NEW REQUIREMENTS GOVERNING UNITED STATES ATTORNEY IMPLEMENTATION OF ILLEGAL REENTRY FAST-TRACK PROGRAMS

Districts prosecuting felony illegal reentry cases (8 U.S.C. § 1326)—the largest category of cases authorized for fast-track treatment—shall implement an early disposition program in accordance with the following requirements and the exercise of prosecutorial discretion by the United States Attorney:

- A. *Defendant Eligibility.* The United States Attorney retains the discretion to limit or deny a defendant's participation in a fast-track program based on—
- (1) The defendant's prior violent felony convictions (including murder, kidnapping, voluntary manslaughter, forcible sex offenses, child-sex offenses, drug trafficking, firearms offenses, or convictions which otherwise reflect a history of serious violent crime);
  - (2) The defendant's number of prior deportations, prior convictions for illegal reentry under 8 U.S.C. § 1326, prior convictions for other immigration-related offenses, or prior participation in a fast-track program;
  - (3) If the defendant is part of an independent federal criminal investigation, or if he or she is under any form of court or correctional supervision; or
  - (4) With supervisory approval, circumstances at the time of the defendant's arrest or any other aggravating factors identified by the United States Attorney.
- B. *Expedited Disposition.* Within 30 days from the defendant being taken into custody on federal criminal charges, absent exceptional circumstances such as the denial of adequate assistance of counsel or a substantial delay in necessary administrative procedures, the defendant must agree to enter into a plea agreement consistent with the requirements of Section C, below.
- C. *Minimum Requirements for "Fast-Track" Plea Agreement.* The defendant must enter into a written plea agreement that includes at least the following items—
- (1) The defendant agrees to a factual basis that accurately reflects his or her offense conduct and stipulates to the facts related to the prior conviction and removal;
  - (2) The defendant agrees not to file any of the motions described in Rules 12(b)(3), Fed. R. Crim. P.;
  - (3) As determined by the United States Attorney after taking into account applicable law and local district court practice and policy, the defendant agrees to waive the right to argue for a variance under 18 U.S.C. § 3553(a), and to waive

appeal and the opportunity to challenge his or her conviction under 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel; and

(4) The United States Attorney shall retain discretion to impose additional procedural requirements for fast-track plea agreements; specifically, the United States Attorney has discretion to require that the defendant agree to enter into a sentencing agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C), and/or to waive a full pre-sentence investigation as conditions of participation.

*D. Additional Provisions of a Plea Agreement.* If the above conditions are satisfied—including those imposed at the discretion of the United States Attorney as provided for in Section C(4)—the attorney for the Government shall move at sentencing pursuant to Sentencing Guidelines Section 5K3.1 for a downward departure from the adjusted base offense level found by the District Court (after application of the adjustment for acceptance of responsibility) as follows:

Four levels for all defendants, except those with a criminal history category VI or with at least one felony conviction for a serious violent offense. For the latter category, if the defendant is not excluded under Section A(1), the government may only offer a two-level departure, with supervisory approval and on a case-by-case basis after considering the interest of public safety.

Districts prosecuting felony illegal reentry cases should implement this new policy no later than by March 1, 2012.<sup>6</sup> This will provide any needed transition, especially for those districts without fast-track programs currently in place.

cc: The Attorney General  
The Associate Attorney General  
The Solicitor General  
The Assistant Attorney General, Criminal Division  
The Director, Executive Office for United States Attorneys

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<sup>6</sup> In the interim, authorization for illegal reentry fast-track programs in districts which already have such programs in place is extended to March 1, 2012. Further, the Department has authorized fast-track programs for offenses other than felony illegal reentry. These other programs will continue to be authorized until March 1, 2012. This extension will allow for a substantive review of these programs in due course.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 ) Case No. \_\_\_\_\_  
 v. )  
 )  
 \_\_\_\_\_, )  
 ) PLEA AGREEMENT  
 Defendant. ) (FAST TRACK)  
 )

The United States of America (also referred to as "the Government") and the Defendant, \_\_\_\_\_, and Defendant's attorney, enter into this Plea Agreement.

**A. CHARGE**

1 Subject Offense. Defendant will plead guilty to Count 1 of the Indictment, that is, being found in the United States following deportation or removal without proper consent, in violation of Title 8, United States Code, Section 1326. **[OR: Defendant will waive Indictment (by executing a separate waiver of Indictment form) and plead guilty to Count 1 of a United States Attorney's Information charging a violation of Title 8, United States Code, Section 1326, that is, being found in the United States following deportation or removal without proper consent.]**

2 No Further Prosecution. The Government agrees that Defendant will not be charged in the Southern District of Iowa with any other federal criminal offense arising from or directly relating to this investigation. This paragraph and this Plea Agreement do not apply to (1) any criminal act occurring after the date of this agreement, or (2) any crime of violence.

**B. MAXIMUM PENALTIES**

3 Maximum Term of Imprisonment and Supervised Release. Defendant

understands that the crime to which Defendant is pleading guilty carries the following maximum penalties:

- if defendant was removed from the United States subsequent to an aggravated felony, a maximum term of imprisonment of 20 years, followed by up to 3 years of supervised release;
- if defendant was removed from the United States subsequent to a felony (other than an aggravated felony), or three or more misdemeanors involving drugs, crimes against the person, or both, a maximum term of imprisonment of 10 years, followed by up to 3 years of supervised release;
- if defendant was specifically excluded or removed from the United States pursuant to Sections 1225(c) (for reasons related to national security) or 1231(a)(4)(B) (early removal of nonviolent offenders who have not completed their term of imprisonment) of Title 8, United States Code, a maximum term of imprisonment of 10 years, followed by up to 3 years of supervised release;
- otherwise, a maximum term of imprisonment of 2 years, followed by one (1) year of supervised release.

4 Fine and Special Assessment. Defendant understands that the Court could impose a fine not to exceed \$250,000, in addition to any period of imprisonment, and that Defendant must also pay a mandatory \$100 special assessment at or before the time of sentencing unless the defendant is indigent. If the Defendant is indigent, the special assessment will be collected pursuant to Title 18, United States Code, Chapters 227 and 229.

5 Supervised Release--Explained. Defendant understands that, during any period of supervised release or probation, Defendant will be under supervision and will be required to comply with certain conditions. If Defendant were to violate a condition of supervised release, including by returning to the United States without permission, Defendant could be sentenced up

to two (2) years in prison [unless no enhancement under 1326(b), in which case maximum is one (1) year], without any credit for time previously served.

6 Detention. Defendant agrees that Defendant will remain in custody following the completion of the entry of Defendant's guilty plea to await the imposition of sentence.

**C. NATURE OF THE OFFENSE -- FACTUAL BASIS AND CRIMINAL HISTORY**

7 Elements Understood. Defendant understands that to prove the subject offense, the Government would be required to prove beyond a reasonable doubt the following elements:

- (1) Defendant is not a citizen of the United States;
- (2) Defendant has been removed or deported from the United States on one or more occasions;
- (3) After being removed or deported from the United States, Defendant was found in the Southern District of Iowa; and
- (4) Defendant did not have permission from the Attorney General of the United States, the Secretary of Homeland Security, or other official to reapply for admission into the United States

8 Elements Admitted. As a factual basis for his plea of guilty, Defendant admits the following:

- (1) Defendant is a citizen of \_\_\_\_\_ and is not a citizen of the United States;
- (2) Defendant was deported, excluded, or removed from the United States on or about \_\_\_\_\_, 20\_\_.
- (3) Defendant was voluntarily present and found in the United States on or about \_\_\_\_\_, 20\_\_, in [name of city], Iowa, which is within the Southern District of Iowa.
- (4) Defendant did not obtain the express consent of the Attorney General or the Secretary of Homeland Security, or any other government official, to reapply for admission prior to returning to the United States.

9 Prior Convictions. For sentencing purposes, Defendant admits that Defendant has been convicted of the following crimes, on or about the dates set forth below, and that Defendant has no other criminal convictions:

- (1) On or about \_\_\_\_\_, 20\_\_, defendant was convicted of the crime of \_\_\_\_\_ in \_\_\_\_\_ County, Iowa, and sentenced to \_\_ years in prison;
- (2) On or about \_\_\_\_\_, 20\_\_, defendant was convicted of the crime of \_\_\_\_\_ in \_\_\_\_\_ County, Iowa, and sentenced to \_\_ years ion prison;

**[Etc.; MODIFY AS APPROPRIATE]**

10 Truthfulness of Factual Basis and Criminal History. Defendant acknowledges that the above statements are true. Defendant understands that, during the change of plea hearing, the judge and the prosecutor may ask Defendant questions under oath about the offense to which Defendant is pleading guilty, in the presence of Defendant's attorney. Defendant understands that Defendant must answer these questions truthfully, and that Defendant can be prosecuted for perjury if Defendant gives any false answers. Additionally, the Government may withdraw from this Plea Agreement if Defendant provides any false information regarding Defendant's offense conduct or Defendant's criminal history.

11 Venue. Defendant agrees that venue for this case is proper for the United States District Court for the Southern District of Iowa.

**D. SENTENCING**

12 Sentencing Guidelines--Fast Track Program--Joint Sentencing Recommendation.  
The disposition contemplated by this Plea Agreement is pursuant to an early disposition (Fast

Track) program authorized by the Attorney General of the United States and as implemented by the United States Attorney for the Southern District of Iowa. Although the parties understand that the Sentencing Guidelines are only advisory and just one of the factors the sentencing judge will consider under 18 U.S.C. § 3553(a), the Government and the Defendant will recommend that the following is the appropriate disposition of this case:

The Defendant's Base Offense Level will be calculated as the sum of Offense Level 8 plus the sentencing guidelines adjustment for Defendant's most serious conviction prior to Defendant's removal from the United States under USSG § 2L1.2(b). Defendant's Final Adjusted Offense Level will be the Base Offense Level minus the appropriate reduction for acceptance of responsibility, and:

- (1) An additional two-level downward departure if the Defendant has a Criminal History Category VI or at least one felony conviction for a serious violent offense, if the Government recommends this additional departure within its sole discretion; or
- (2) An additional four-level downward departure if Defendant's Criminal History Category is less than VI and defendant does not have a conviction for a serious violent offense.

The parties specifically agree to jointly recommend a sentence within the applicable guideline range and to seek no departures or variances, either upward or downward. Defendant understands, however, that Defendant's sentence will be determined by the sentencing judge after considering the advisory United States Sentencing Guidelines, together with other factors set forth by law, and that the Court is not required to accept the parties' recommendation.

13     Acceptance of Responsibility. The Government agrees to recommend that Defendant receive credit for acceptance of responsibility under USSG § 3E1.1. The Government reserves the right to oppose a reduction under § 3E1.1 if after the plea proceeding Defendant obstructs justice, fails to cooperate fully and truthfully with the United States Probation Office,

attempts to withdraw Defendant's plea, or otherwise engages in conduct not consistent with acceptance of responsibility. If the base offense level is 16 or above, as determined by the Court, the Government agrees that Defendant should receive a 3-level reduction, based on timely notification to the government of Defendant's intent to plead guilty.

14 Presentence Report. Defendant understands that the Court may defer a decision as to whether to accept this Plea Agreement until after a Presentence Report has been prepared by the United States Probation Office, and after Defendant's attorney and the Government have had an opportunity to review and challenge the Presentence Report. The parties are free to provide all relevant information to the Probation Office for use in preparing a Presentence Report. The parties agree to recommend that the Court order preparation of an abbreviated or "modified" presentence report.

15 Evidence at Sentencing. The parties may make whatever comment and evidentiary offer they deem appropriate at the time of sentencing and entry of plea, provided that such offer or comment does not violate any other provision of this Plea Agreement. Nothing in this Plea Agreement restricts the right of Defendant to make an allocution statement, to the extent permitted under the Federal Rules of Criminal Procedure.

16 Sentence to be Decided by Judge -- No Promises. This Plea Agreement is entered pursuant to Rule 11(c)(1)(A) of the Federal Rules of Criminal Procedure. Defendant understands that the final sentence, including the application of the Sentencing Guidelines and any upward or downward departures, is within the sole discretion of the sentencing judge, and that the sentencing judge is not required to accept any factual or legal stipulations agreed to by the parties. Any estimate of the possible sentence to be imposed, by a defense attorney or the

Government, is only a prediction, and not a promise, and is not binding. Therefore, it is uncertain at this time what each Defendant's actual sentence will be.

17 No Right to Withdraw Plea. Defendant understands that Defendant will have no right to withdraw Defendant's plea if the sentence imposed, or the application of the Sentencing Guidelines, is other than what Defendant anticipated, or if the sentencing judge declines to follow the parties' recommendations.

#### **F. LIMITED SCOPE OF AGREEMENT**

18 Limited Scope of Agreement. This Plea Agreement does not limit, in any way, the right or ability of the Government to investigate or prosecute Defendant for crimes occurring outside the scope of this Plea Agreement.

19 Agreement Limited to Southern District of Iowa. This Plea Agreement is limited to the United States Attorney's Office for the Southern District of Iowa, and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authorities.

20 Immigration Consequences of Defendant's Guilty Plea. Defendant has discussed with Defendant's counsel the impact of Defendant's guilty plea on Defendant's immigration status if Defendant is not a citizen of the United States. Defendant specifically understands that Defendant's guilty plea may restrict Defendant's ability to challenge Defendant's removal from the United States in the future, and that Defendant may be subject to immediate removal from the United States following the service of Defendant's sentence. Defendant further understands that Defendant is pleading guilty to an "aggravated felony," which means that Defendant would be subject to enhanced criminal penalties if Defendant were to reenter the United States without authorization.

21 Reinstatement of Prior Order of Removal. The Defendant admits that Defendant was the subject of a previous order of removal, deportation or exclusion. The Defendant agrees to reinstatement of that previous order of removal, deportation or exclusion. The Defendant states that Defendant does not have a fear of returning to the country designated in the previous order. If this Plea Agreement is accepted by the Court, the Defendant agrees not to contest, either directly or by collateral attack, the reinstatement of the prior order of removal, deportation, or exclusion. Defendant understands that Defendant will not be removed from the United States until after Defendant has served any criminal sentence imposed in this or any other criminal case.

**G. WAIVER OF TRIAL, APPEAL AND POST-CONVICTION RIGHTS**

22 Trial Rights Explained. Defendant understands that this guilty plea waives the right to:

- (a) continue to plead not guilty and require the Government to prove the elements of the crime beyond a reasonable doubt;
- (b) a speedy and public trial by jury, which must unanimously find Defendant guilty before there can be a conviction;
- (c) the assistance of an attorney at all stages of trial and related proceedings, to be paid at government expense if Defendant cannot afford to hire an attorney;
- (d) confront and cross-examine adverse witnesses;
- (e) present evidence and to have witnesses testify on behalf of Defendant, including having the court issue subpoenas to compel witnesses to testify on Defendant's behalf;
- (f) not testify or have any adverse inferences drawn from the failure to testify (although Defendant also has the right to testify, if Defendant so chooses); and
- (g) if Defendant is convicted, the right to appeal, with the assistance of an attorney, to be paid at government expense if Defendant cannot afford to hire an attorney.

Defendant knowingly and expressly waives any and all rights to appeal Defendant's conviction in this case, including a waiver of all motions, defenses and objections which Defendant could assert to the charge or to the court's entry of judgement against Defendant; except that both Defendant and the United States preserve the right to appeal any sentence imposed by the district court, to the extent that an appeal is authorized by law. Also, Defendant knowingly and expressly waives any and all rights to contest Defendant's conviction in any post-conviction proceedings, including any proceedings under 28 U.S.C. § 2255. These waivers are full and complete, except that they do not extend to the right to appeal or seek post-conviction relief based on grounds of ineffective assistance of counsel or prosecutorial misconduct not known to Defendant, or reasonably knowable, at the time of entering this Plea Agreement.

**H. VOLUNTARINESS OF PLEA AND OPPORTUNITY TO CONSULT WITH COUNSEL**

24 Voluntariness of Plea. Defendant represents that Defendant's decision to plead guilty is Defendant's own, voluntary decision, and that the following is true:

- (a) Defendant has had a full opportunity to discuss all the facts and circumstances of this case with Defendant's attorney, and Defendant has a clear understanding of the charges and the consequences of this plea, including the maximum penalties provided by law.
- (b) No one has made any promises or offered any rewards in return for this guilty plea, other than those contained in this written agreement.
- (c) No one has threatened Defendant or Defendant's family to induce this guilty plea.
- (d) Defendant is pleading guilty because in truth and in fact Defendant is guilty and for no other reason.

25 Consultation with Attorney. Defendant has discussed this case and this plea with

Defendant's attorney and states that the following is true:

- (a) Defendant is satisfied with the representation provided by Defendant's attorney.
- (b) Defendant has no complaint about the time or attention Defendant's attorney has devoted to this case nor the advice the attorney has given.
- (c) Although Defendant's attorney has given Defendant advice on this guilty plea, the decision to plead guilty is Defendant's own decision. Defendant's decision to enter this plea was made after full and careful thought, with the advice of Defendant's attorney, and with a full understanding of Defendant's rights, the facts and circumstances of the case, and the consequences of the plea.

#### **I. GENERAL PROVISIONS**

26 Entire Agreement. This Plea Agreement, and any attachments, is the entire agreement between the parties. Any modifications to this Plea Agreement must be in writing and signed by all parties.

27 Public Interest. The parties state this Plea Agreement is in the public interest and it takes into account the benefit to the public of a prompt and certain disposition of the case and furnishes adequate protection to the public interest and is in keeping with the gravity of the offense and promotes respect for the law.

28 Execution/Effective Date. This Plea Agreement does not become valid and binding until executed by each of the individuals (or their designated representatives) shown below. This Plea Agreement must be signed by the Defendant and Defendant's counsel, and delivered to the United States Attorney's Office, no later than \_\_\_\_\_, 20\_\_ [30 days from initial appearance or indictment], with the parties agreeing that the change of plea proceeding should occur at the earliest time that can be accommodated by the Court

29 Consent to Proceedings by Video-Conferencing. Defendant consents to any

proceedings in this case, including his plea proceedings, sentencing proceedings, or any other proceedings, being conducted by video-conferencing technology in use within the Southern District of Iowa if approved by the Court.

**J. SIGNATURES**

30 Defendant. I have read all of this Plea Agreement and have discussed it with my attorney. I fully understand the Plea Agreement and accept and agree to it without reservation. I do this voluntarily and of my own free will. No promises have been made to me other than the promises in this Plea Agreement. I have not been threatened in any way to get me to enter into this Plea Agreement. I am satisfied with the services of my attorney with regard to this Plea Agreement and other matters associated with this case. I am entering into this Plea Agreement and will enter my plea of guilty under this Agreement because I committed the crime to which I am pleading guilty. I know that I may ask my attorney and the judge any questions about this Plea Agreement, and about the rights that I am giving up, before entering into the plea of guilty.

\_\_\_\_\_  
Date

\_\_\_\_\_  
[DEFENDANT'S NAME]

31 Defendant's Attorney. I have read this Plea Agreement and have discussed it in its entirety with my client. There is no Plea Agreement other than the agreement set forth in this writing. My client fully understands this Plea Agreement. I am satisfied my client is capable of entering into this Plea Agreement, and does so voluntarily of Defendant's own free will, with full knowledge of Defendant's legal rights, and without any coercion or compulsion. I have had full

access to the Government's discovery materials, and I believe there is a factual basis for the plea. I concur with my client entering into this Plea Agreement and in entering a plea of guilty pursuant to the Plea Agreement.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name of Defense Lawyer

123 Westown Parkway, Suite 10  
West Des Moines, Iowa 55555  
Telephone: (---)-\_\_-\_\_\_\_  
Telefax: (---)-\_\_-\_\_\_\_  
E-Mail: Defense.Lawyer@yahoo.com

32 United States. The Government agrees to the terms of this Plea Agreement.

Nicholas A. Klinefeldt  
United States Attorney

\_\_\_\_\_  
Date

By: \_\_\_\_\_

YOUR NAME HERE  
Assistant U.S. Attorney  
U.S. Courthouse Annex, Suite 286  
110 East Court Avenue  
Des Moines, Iowa 50309  
Telephone: 515-473-9300  
Telefax: 515-473-9292  
E-mail: Your.Name@usdoj.gov

CERTIFICATION OF INTERPRETATION

The undersigned hereby certifies that he/she is fluent in the English language and the **Spanish** language; and that he/she has truly and accurately sight-translated the foregoing PLEA AGREEMENT in the presence of [DEFENDANT'S NAME], providing a complete and accurate rendition in order to convey the true legal equivalent of the entire document to the best of his/her knowledge and ability, in accordance with the Code of Professional Responsibility of the Official Interpreters of the United States Court.

Interpreter's Name (printed): \_\_\_\_\_

\_\_\_\_\_  
Date

\_\_\_\_\_  
Interpreter's Signature

# BNA Insights

## RIGHT TO COUNSEL

### Supreme Court's Rulings on Ineffective Assistance at Plea Bargaining Stage Call for New Efforts by Not Only Defense Counsel but Also Prosecutors and Judges



BY LAURIE L. LEVENSON

It is a big year for U.S. Supreme Court cases. Health care, affirmative action, GPS devices, strip searches—the court selected many of the hot-button issues to decide this term. Among the most important cases are *Missouri v. Frye*, 2012 BL 67235 (U.S. 3/21/2012), and *Lafler v. Cooper*, BL 67236 (U.S. 3/21/2012). In these opinions, the court recognized that plea bargaining lies at the heart of the way that the current criminal justice system operates. Thus, the court's decision to set standards for defense counsel's assistance during plea bargaining has the potential to dramatically affect how plea bargaining is handled in this country.

Plea bargains are the lifeblood of the American criminal justice system. Current studies suggest that up to 95 percent of all cases are resolved by plea bargaining. Yet, courts rarely monitor what occurs during the plea-bargaining process. Practices vary tremendously. From extensive negotiations with formal, written plea-agreement contracts to a process most resembling horse-trading in arraignment courts, defendants' fates are resolved by lawyers deciding, with only minimal input by the client, how cases should be resolved. With the focus on efficiently and expeditiously resolving

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cases, defendants—especially those least educated and sophisticated—often get left in a fog.

In his opinions in *Frye* and *Cooper*, Justice Anthony M. Kennedy tried to change that dynamic by holding that the minimum standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), also apply to plea bargaining by counsel. Yet, as even Kennedy had to admit, a standard established to judge counsel's performance at trial or in preparing for trial is less than a perfect fit for the plea-bargaining process.

First, it is important to look at exactly what the court decided in this pair of 5-4 opinions. Then one must consider the likely practical impact on defense lawyers, prosecutors, and judges.

#### ***Missouri v. Frye*: 'Thou Shalt Communicate With Your Client!'**

In *Frye*, Galin Frye was charged with driving with a revoked license. Because this was his fourth violation, he was charged under Missouri law with a felony that carried a maximum four-year prison term. The prosecutor sent Frye's lawyer a letter offering to reduce the charge to a misdemeanor and to recommend a 90-day sentence if Frye would plead guilty. Frye's lawyer never conveyed the offer to Frye, and the offer expired. Right before Frye's preliminary hearing, he was arrested again for the same offense. Frye ended up pleading guilty with no underlying plea agreement and was sentenced to three years in prison.

On habeas corpus review, Frye claimed his Sixth Amendment right to effective assistance of counsel was violated because his counsel failed to inform him of the prosecution's plea offer and he would have accepted the offer if he had known about it. The first hurdle Frye had to overcome in making his claim was to convince the court that he had a right to effective assistance of counsel at the plea-bargaining stage, given that the Supreme Court has never recognized a constitutional right to plea bargaining. Yet the majority in *Frye* had little trouble recognizing plea bargaining as a "critical stage" at which the Sixth Amendment guaranteed the defendant the right to counsel.

Extrapolating from the court's opinion in *Hill v. Lockhart*, 474 U.S. 52 (1985) and its more recent decision in *Padilla v. Kentucky*, 2010 BL 70791 (U.S. 2010), Kennedy held that the Sixth Amendment guaranteed Frye the right to effective assistance of counsel during

plea bargaining. Neither *Hill* nor *Padilla* was directly on point because they focused more on whether counsel's misadvice negated their clients' guilty pleas. In *Hill*, defense counsel misinformed the defendant of the amount of time he would have to serve before he became eligible for parole. In *Padilla*, the court set aside a plea because defense counsel misinformed the defendant of the immigration consequences of the conviction. Yet the language from these cases became critical to the task of finding a general duty of effective assistance of counsel in plea bargaining. In particular, Kennedy focused on the court's statement in *Padilla* that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."

Although Kennedy recognized that there is a difference between invalidating a plea because bad advice was given regarding the guilty plea and the situation in *Frye*, where the challenge was to defense counsel's conduct during plea bargaining before the plea proceedings, he found that the differences were not constitutionally significant. More important, he was convinced that the "simple reality" of our criminal justice system made it imperative for the court to include counsel's conduct during plea bargaining within the Sixth Amendment's umbrella. As Kennedy noted, 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages," he stated.

Yet, recognizing the right to effective assistance of counsel during plea bargaining was just step No. 1 in the court's analysis. The more challenging task was defining what standards should be used in measuring whether counsel has met Sixth Amendment requirements. Pursuant to the ineffective assistance of counsel standard set forth in *Strickland*, a defendant must demonstrate that counsel's representation fell below professional standards. While it may not be possible to identify exact standards for how counsel should act during plea bargaining, the minimum requirements are not that difficult to identify.

The most basic requirement is that a lawyer must actually communicate the terms of a formal plea offer to the client. Especially when there is an offer with an expiration date, defense counsel must let the client consider the offer before it expires. This is not a new concept. The American Bar Association Standards for Criminal Justice and many states' professional standards require counsel to promptly communicate and explain plea offers to a client. See ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999).

Step No. 2 of the *Strickland* analysis, as applied to plea bargaining, is a little more challenging. How does a defendant show that counsel's ineffective assistance during plea bargaining prejudiced his or her case? Here, the court held that to establish prejudice, *Frye* would have to show "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." If it is an offer, like that in *Frye*, that could be withdrawn by the prosecution or

rejected by the court, the defendant must show that the offer would have remained and that he would have received the benefit of the plea bargain.

Despite the many "ifs" in the court's standard, the majority felt confident that on remand these issues could be resolved. In fact, the court suggested that *Frye* might not be able to meet the standard given that he picked up a new charge for driving without a license shortly before his plea, which quite likely might have led the prosecution to withdraw its offer or have prompted the trial court to reject it. Nonetheless, *Frye* should have an opportunity to demonstrate whether his case was prejudiced.

Justice Antonin Scalia wrote for the four dissenters, who objected to the majority's decision on the most basic level. As the dissent states, "The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of plea bargaining but with the fairness of conviction." *Frye* never argued that he was not guilty of the offense to which he pleaded guilty. His conviction was fair, even though he might have hoped for a more favorable resolution of the case.

### ***Lafler v. Cooper*: 'Thou Shalt Give Your Client Accurate Information in Deciding Whether to Accept a Plea Bargain'**

In the companion case of *Lafler v. Cooper*, Kennedy again wrote for the majority. While this was another case involving plea bargaining, the misstep by defense counsel was different.

Anthony Cooper was charged with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. Evidently Cooper, a convicted felon, pointed a gun and shot at his victim's head. The shot missed and the victim ran. Cooper shot again and hit her in the buttocks, hip, and abdomen. She survived the shots.

Prosecutors twice offered to dismiss two of the charges and recommend a sentence of 51 to 85 months for the other charges. Defendant admitted his guilt in communications with the court and expressed a willingness to accept the offer. However, he changed his mind when his lawyer convinced him that the prosecution would be unable to establish intent to murder the victim because she had been shot below the waist. Cooper ended up going to trial, rejecting yet another plea offer on the first day of trial. He was convicted by a jury and received a mandatory minimum sentence of 185 to 360 months' imprisonment, more than three times what he would have received if he had accepted the prosecution's initial plea offer.

Using the analytic structure established in *Frye* and *Strickland*, the Supreme Court held that counsel's advice constituted ineffective assistance of counsel. First, the parties conceded that counsel's performance was deficient. No competent counsel would have believed that Cooper could not be found to have the intent to murder simply because his shots had hit the victim below the waist. Second, the court held that, but for counsel's deficient performance, there was a reasonable

probability that he and the trial court would have accepted the guilty plea. His letters to the court and testimony at a post-conviction hearing established that fact.

The real issue was what the remedy should be. How could Cooper be made whole at this point? The Supreme Court held that the proper remedy was to order the state to reoffer the plea bargain.

While raising issues similar to those in *Frye*, *Cooper* added another dimension to the court's decision to recognize a right to effective assistance of counsel during plea bargaining. *Cooper's* case was not like that of *Hill*, in which the court had held that improper advice by counsel could invalidate a guilty plea. *Cooper* went to trial. He did not argue that he received an unfair trial. Rather, he relied on a yet-to-be-recognized right to accept a plea bargain.

In the end, the court found the distinction to be without a difference. The defendant's fair trial did not wipe clean his lawyer's deficiencies. With plea bargaining such a critical aspect of the criminal justice system, saying that a fair trial makes up for any deficiencies in counsel's conduct during the pretrial process ignores the reality of the substantial effect plea bargaining can have on a defendant's future.

The dissent was even more vociferous in *Cooper* than it had been in *Frye*. Writing for the dissenters, Scalia lamented the creation of a "whole new field of constitutionalized criminal procedure: plea-bargaining law." He warned that there are many more dimensions of plea bargaining that will have to be addressed and that, although the two cases this term focused on defense counsel's behavior, the next ones down the road may inevitably try to establish "constitutional" rules regarding prosecutors' behavior in the criminal justice system.

For the dissenters, a defendant's constitutional rights are about whether the defendant received a full and fair trial. Since *Cooper* received such a trial, he had no constitutional right to a plea bargain. Moreover, the court's remedy that the prosecution reoffer its original plea offer constituted undue interference with the criminal justice process, they said. Plea bargaining may be in great use in the United States, but it is at best "a necessary evil" and "embarrassing adjunct" to our criminal justice system, according to Scalia. By recognizing the right to effective assistance of counsel at plea bargaining, the court had shifted to making plea bargaining "the criminal justice system."

In language that is the trademark of Scalia, he wrote:

The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.

The other dissenters did not join in this part of his opinion, but his point was clear. The Constitution guarantees the right to a fair trial, and nothing that happens in the plea-bargaining process undermines that right.

In his separate, solo dissent, Justice Samuel A. Alito Jr. focused on an evident weakness in the majority's decision. The majority left implementation of the remedy to the trial court. Is it fair after the prosecution goes to trial to require it to vacate some of the convictions?

Alito wondered. How will courts decide what to do when, years after a conviction, there is an allegation that the defendant received ineffective assistance of counsel during the plea-bargaining process? It is well and good for the court to say that it leaves the issue to the "discretion of the trial court," but there is very little guidance about how judges should exercise that discretion, he said.

### Aftermath of *Frye* and *Cooper*: What Do We Do Now?

How are *Frye* and *Cooper* likely to change the actions of defense counsel, prosecutors, and the courts? The court's decisions in these cases are likely to have a significant practical impact on plea bargaining practices across the nation.

**Defense Counsel's Responsibilities.** First, defense lawyers must do what they should have been doing all along. They need to talk to their clients and give them accurate advice. This may sound easy, but in the quick-moving, rough-and-tumble world of plea bargaining, it is not always easy for counsel to have in-depth discussions about all the prosecution's offers. Often, their clients cannot be reached by simply picking up the phone. Defense lawyers must go through elaborate processes to visit clients in jail and, even then, the conditions are less than optimal for having full conferences regarding plea offers.

Second, defense counsel must keep clear records of not only the offers prosecutors present but also their expiration dates, how likely they are to be withdrawn, how and when the offers were presented to the client, and what changes are made in the offers. Of course, many lawyers already do this, but the Supreme Court's decisions will make the lawyer's recordkeeping key evidence in any post-plea or post-trial hearings.

Third, defense counsel should probably give every indication to the prosecution that a defendant is likely to accept an offer, even if counsel is unsure, so that the record remains strong for subsequent proceedings. Therefore, it might be more difficult for defense counsel to be as candid with prosecutors as to the likelihood of a defendant accepting a plea offer because telling a prosecutor straight out that a client does not seem so inclined may later hurt the defendant's chances at post-conviction relief.

Finally, defense counsel must consider every plea bargain to be as important as a trial. This is not necessarily a bad thing. Certainly a defendant pleading guilty would expect such a commitment by defense counsel. Yet, for defense lawyers, pleas have long taken a back seat to trial preparation. Given the court's decisions, this can no longer be the case.

**Prosecutors' Responsibilities.** Prosecutors will also find themselves with newfound responsibilities after *Frye* and *Cooper*. To ensure that a defendant will not be able to win reversal of his conviction years down the line, prosecutors should document all plea offers, their expiration dates, the conditions under which they will be withdrawn, and whether they are binding on the court. Then, the prudent prosecutor may ask for written confirmation that the offer has been shared with the client. Undoubtedly prosecutors' offices will start developing signed notice forms that can be used to document plea offers.

Prosecutors should also ask the court to put on the record before a trial whether there were any plea offers and that the defendant rejected the offer. The complication with this is that judges, at least in the federal system, should not be involved in plea bargaining. One must be concerned how even this effort might subtly involve the judge in plea discussions. Thus, it may be necessary to have the defendant verify that a plea offer was made but have the written terms of that plea offer lodged with the court under seal.

Finally, prosecutors might find themselves in the awkward position of having the court inquire whether defense counsel has not only shared a plea offer but has adequately answered the defendant's questions regarding the process and applicable law that would affect his decision whether to accept the offer.

The plea-bargaining process, which is intended to make the criminal justice process more expeditious, may need to be slowed down to accommodate the new procedures that will ensure effective assistance of counsel during plea bargaining.

**Judges' Responsibilities.** Ultimately, the responsibility will fall on judges to ensure that defense counsel adequately participates in the plea-bargaining process. This is true regardless of whether the case ends in a guilty plea or with a trial. A prudent judge will now ask the parties and counsel whether there were any plea offers and whether their terms were communicated to the defendant. Moreover, the judge may also ask counsel to put on the record, in camera or in open court, why a defendant is declining a plea offer.

The judge must take these steps without interfering with the attorney-client relationship. Defense counsel may be privy to additional information demonstrating why a defendant should not accept the deal, but the judge is not necessarily entitled to have all this information. Judges must also resist the temptation to second-guess defense counsel's strategy in counseling a client

to reject a plea offer. As in *Strickland*, great deference should be afforded to the decisions of defense counsel. While the court may view a plea offer as too good to refuse, defense counsel may have strategic reasons to suggest that the defendant reject a specific plea offer.

Finally, the court must maintain its role as an impartial decision maker and resist any temptation to be drawn into the actual plea negotiations. Pursuant to Fed. R. Crim. P. 11(c) (1), "The court must not participate in [plea agreement] discussions." To preserve the court's impartiality and avoid putting undue pressure on a defendant to accept a plea deal, the rules specifically prohibit judges from participating in plea bargaining. See *United States v. Bradley*, 455 F.3d 453 (4th Cir. 2006). Courts must now walk the line between documentation of plea offers and unnecessary and unwarranted intrusion into the plea bargaining process.

## Conclusion

The lessons of *Frye* and *Cooper* seem simple on their face: Defense counsel must convey all plea offers to a client and then provide adequate advice as to whether to accept such offers.

However, as the Supreme Court recognized in these recent decisions, this simple rule will not always be easily enforced. Plea bargaining is more of an art than a science; there is no "one way" to cut the perfect deal.

Like it or not, the plea-bargaining process will continue. Defense lawyers have a Sixth Amendment duty to professionally advise their clients with respect to such negotiations. However, everyone in the criminal justice system, including the judge, must now keep track of what pleas are being made and whether the defendant has been adequately counseled about the advisability of the plea deal. The plea-bargaining process may be distasteful and a nuisance, but it is also a reality. Today's "justice" comes with plenty of strings attached.



## U.S. Department of Justice

*United States Attorney  
Southern District of Iowa*

*Criminal Division*

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April 18, 2012

Honorable James E. Gritzner, Chief Judge  
United States District Court  
123 East Walnut Street, Room 130  
Des Moines, Iowa 50309

Honorable Thomas J. Shields, Chief Magistrate Judge  
United States District Court  
131 East Fourth Street, Room 228  
Davenport, Iowa 52801

Re: Preliminary Response to *Lafler* and *Frye*

Dear Chief Judge Gritzner and Chief Magistrate Judge Shields:

In response to the Supreme Court's recent decisions in *Lafler v. Cooper* and *Missouri v. Frye*, prosecutors in this office have been instructed to make a record of any plea offers previously extended prior to the commencement of trial. We believe that a direct colloquy with a judicial officer will be prudent--similar to the record often made regarding a defendant's right to testify--given that the Supreme Court has indicated that a defendant is entitled to be presented with a plea offer before it expires and, moreover, to have effective assistance of counsel to evaluate any plea offers extended by the prosecution. We recognize that the law is still developing in this area, and that other districts have taken a variety of procedural approaches.

In some instances, it may be sufficient for such a colloquy to occur on the morning of trial, prior to jury selection, whereas in other cases a more formal pretrial conference (with the defendant present) may be appropriate, in order to avoid bringing in a jury if a defendant elects to accept the government's plea offer (assuming that it has not been withdrawn).

In order to stay within the spirit of Fed. R. Crim. P. 11(c)(1), which prohibits involvement by the trial court in plea discussions, we respectfully suggest that these colloquies be conducted by a magistrate judge whenever possible. For example, we understand that the District of

Hon. James E. Gritzner  
Hon. Thomas J. Shields  
April 18, 2012  
Page 2 of 2

Maryland is considering a system where a magistrate judge will conduct a colloquy regarding previous plea offers at the beginning of trial, prior to jury selection and before the district judge takes the bench.

We also expect to make a brief record in cases where a defendant is pleading guilty without the benefit of a plea agreement, i.e., either that no plea offer has been extended or the terms of the plea offer that the defendant has rejected (or has expired).

As indicated, we recognize that this is a new issue for all of us and that any procedures that the Court may choose to adopt may be subject to change based upon experience and developments in the case law. In the meantime, this office will be proceeding as described above, essentially on a case-by-case basis.

Please don't hesitate to contact me if you have any questions about how prosecutors in this office are handling this issue. Additionally, this may be a fruitful topic for discussion at the next Brown Bag meeting with the Magistrate Judges.

Sincerely,

Nicholas A. Klinefeldt  
United States Attorney

By:   
Andrew H. Kahl  
Assistant U.S. Attorney  
Chief, Criminal Division

cc: Hon. Robert W. Pratt, U.S. District Judge  
Hon. John A. Jarvey, U.S. District Judge  
Hon. Harold D. Vietor, Senior U.S. District Judge  
Hon. Charles R. Wolle, Senior U.S. District Judge  
Hon. Ronald E. Longstaff, Senior U.S. District Judge  
Hon. Celeste F. Bremer, U.S. Magistrate Judge  
Hon. Ross A. Walters, U.S. Magistrate Judge  
Mr. James F. Whalen, Esq., Acting Federal Defender  
Ms. Angela Campbell, Esq., CJA Panel Representative  
Hon. Nicholas A. Klinefeldt, United States Attorney  
Assistant U.S. Attorneys

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Robert Wichser  
Davenport  
Terence McAtee  
Diane Hephrey  
*Research & Writing Attorney*  
John Messina

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April 20, 2012

Honorable James E. Gritzner  
Chief District Court Judge  
123 E. Walnut Street  
Des Moines, Iowa 50309

The Honorable Thomas J. Shields  
Chief Magistrate Judge, U.S. District Court  
131 East Fourth Street  
Davenport, Iowa 52801

RE: *Lafler & Frye*

Dear Chief Judge Gritzner & Chief Magistrate Judge Shields:

I write in response to the government's preliminary response to *Lafler v. Cooper*, and *Missouri v. Frye*. We believe that the government's response is something of an over-reaction to the two decisions and that the colloquy suggested by the government will invade the attorney-client relationship.

The underlying issue in both cases was the same. Is a plea negotiation a stage of trial during which a defendant is entitled to counsel, and to the effective assistance of counsel? Granted, there is no constitutional right to a plea bargain, but, like many other non-constitutional rights, such as a direct appeal, if counsel is provided during that stage of trial the defendant is entitled to effective assistance from counsel.

In both cases Justice Kennedy wrote for a 5-4 majority, holding that where the defendant, to his or her detriment, does not accept a favorable plea offer, and the failure to accept the offer is the result of a breach of a professional duty by counsel, then the *Strickland v. Washington* test should be applied to determine whether the defendant is entitled to relief.

The standards of performance to which the defense bar is expected to adhere after *Lafler* and *Frye* are no different than they were before. These decisions merely add advice during plea negotiations to the long list of any attorney's duties to which the *Strickland* test applies.

In the past, the government has not requested a colloquy at the outset of trial to determine whether defense counsel has breached a material duty in any of the numerous ways attorneys have been found to be ineffective in prior cases. There is no reason why the duties discussed in *Lafler* and *Frye* should be singled out for such treatment.

The presentation by counsel to the defendant of a proposed plea agreement, the defendant's responses, and counsel's advice concerning the relative strengths of the government's witnesses and those of the defense, are all privileged communications. There is no way to parse a colloquy, especially at the outset of trial, without revealing elements of trial strategy and the secrets and confidences of the client. Even after trial, the matters revealed during the colloquy might be used at sentencing to the defendant's detriment.

It is a positive development that criminal defendants who proceed to trial based upon faulty advice by defense counsel and upon counsel's failure to inform them of favorable plea agreement proposals should have a post-conviction remedy, to the same extent that all defendants aggrieved by *Strickland* ineffective assistance have such a remedy. However, the *Strickland* analysis begins with a presumption that counsel has acted competently. The government's proposal would change that presumption.

The government also suggests in its letter that in order to stay within the spirit of F.R.Crim.P. 11(c)(1), the suggested colloquies should be conducted by a magistrate judge whenever possible. We do not believe that having magistrates conduct this inquiry would address any of the problems contemplated by that Rule. Rule 11(c)(1) says, in part: "The court must not participate in these discussions." It does not differentiate between district court judges and magistrate judges.

We do agree that this is a new issue, and that further discussion of this issue may be helpful to everyone concerned. We would appreciate the opportunity to discuss these matters with the court and the U.S. Attorney's Office prior to the adoption, either formally or *de facto*, of a colloquy procedure regarding plea bargaining.

Sincerely,

James Whalen  
Acting Federal Defender

JW:ejw

cc: Judge Pratt  
Judge Jarvey  
Judge Vietor  
Judge Wolle  
Judge Longstaff  
Judge Bremer  
Judge Walters  
Angela Campbell, CJA Panel Rep.  
Nick Klinefeldt, U.S. Attorney  
Andy Kahl, Asst. U.S. Attorney  
All Asst. Public Defenders - SDIA



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## Federal Rules of Criminal Procedure

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### RULE 11. PLEAS

#### (a) ENTERING A PLEA.

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

#### (b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

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(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(C) PLEA AGREEMENT PROCEDURE.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo

contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

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

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

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

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

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

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

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

(d) WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA. A defendant may withdraw a plea of guilty or nolo contendere:

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

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

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

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

(e) FINALITY OF A GUILTY OR NOLO CONTENDERE PLEA. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

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

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

## NOTES

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94-64, §3(5)-(10), July 31, 1975, 89 Stat. 371, 372; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Pub. L. 100-690, title VII, §7076, Nov. 18, 1988, 102 Stat. 4406; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

### NOTES OF ADVISORY COMMITTEE ON RULES—1944

Westlaw

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Slip Copy, 2012 WL 566958 (W.D.Va.)  
(Cite as: 2012 WL 566958 (W.D.Va.))

Only the Westlaw citation is currently available.

United States District Court, W.D. Virginia,  
Abingdon Division.  
In re Michael A. BRAGG.

No. 1:11CR00026-002.  
Feb. 21, 2012.

Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, VA, for the United States.

Michael A. Bragg, Abingdon, VA, pro se.

#### OPINION AND ORDER

JAMES P. JONES, District Judge.

\*1 In this troublesome and distracting matter, a criminal defense attorney who regularly practices before this court is charged with violating the court's standard discovery order by leaving discovery materials, including grand jury transcripts and law enforcement reports, with his client in jail. Because I agree that this was a serious violation of the court's order, I will invoke the court's inherent authority and sanction the attorney.

This matter began when the government filed in a pending criminal case a Motion for an Order to Show Cause to determine why defense counsel should not be held in contempt for violating a discovery order entered by the magistrate judge on August 25, 2011 (hereafter, the "Discovery Order"). Defense counsel, attorney Michael A. Bragg, filed a Response and thereafter the parties appeared before the magistrate judge for a hearing to determine if she should direct Mr. Bragg to appear before a district judge to show cause. *See* 28 U.S.C.A. § 636(e)(6) (West 2006) (providing procedure for certification of contempt matters from magistrate judge to district court).<sup>FN1</sup>

FN1. In light of the allegations against him, Mr. Bragg moved for leave to with-

draw from his representation of the defendant, which motion was granted by the magistrate judge.

Thereafter, the magistrate judge issued a Certification of Facts and Order to Show Cause, requiring Mr. Bragg to appear before the undersigned to show cause why he should not be held in criminal contempt pursuant to 18 U.S.C.A. § 401(3) (West 2000 & Supp.2011). A show cause hearing was held before me on February 2, 2012. Mr. Bragg represented himself. The matter is now fully submitted and ripe for decision.

The facts are based on the record, including the magistrate judge's certification, and are not disputed by the parties. Mr. Bragg, a member of the bar of this court, is an experienced criminal defense attorney who serves on this court's Criminal Justice Act ("CJA") panel. He was appointed to represent defendant Chris Avery at the time of Avery's arrest on July 14, 2011. On July 25, 2011, Avery was indicted on charges of drug conspiracy, carrying a firearm in furtherance of a drug trafficking crime and possession of a firearm by a convicted felon.

On August 24, 2011, the government filed for consideration by the magistrate judge a Motion for Voluntary Disclosure of Grand Jury and Other Materials and for Limitations on Further Disclosure. The motion sought the court's permission to provide voluntary discovery to defense counsel. The motion stated:

The United States submits the accompanying proposed Order in the interest of both advancing the case and protecting the secrecy of grand jury, tax return, criminal histories, and other investigative materials. The attached proposed order would prevent the unauthorized dissemination of materials voluntarily provided by the United States and would provide notice of sanctions in the event these materials were deliberately disclosed in an unauthorized manner or to unauthorized persons.

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(Gov't's Mot. for Voluntary Disclosure 1.)

On August 25, 2011, the magistrate judge entered the Discovery Order, permitting the government to voluntarily disclose to counsel for the defendant "grand jury, tax return, criminal histories, and other investigative materials." ( Discovery Order 1.) The Discovery Order is a standard form proposed by the government and frequently entered by the magistrate judge in criminal cases in this court. It contained the following restriction:

\*2 [C]ounsel for the defense and the individual defendant(s) may use this material solely for the defense of the case, may not photocopy the material except as needed for defense of the case (any photocopy is governed by this order as if it was an original), may not remove this material from the office of defense counsel unless kept in the personal possession of defense counsel at all times....

(*Id.*) The Discovery Order further stated that:

Unauthorized disclosure of grand jury, tax return, criminal histories, or investigative materials is a violation of federal law and violation of this Order may be deemed a contempt of court pursuant to 18 U.S.C. § 401.

(*Id.* at 2.)

After the Discovery Order was entered, the government provided Mr. Bragg with numerous discovery materials in electronic form. The materials included grand jury transcripts and other investigative documents, such as law enforcement investigative reports and summaries of witness interviews.

On or about January 9, 2012, deputy United States marshals conducted a search of Avery's cell at the Southwest Virginia Regional Jail, where Avery was detained pending trial. They discovered and seized certain documents, copies of which have been filed under seal as an exhibit to the Motion for an Order to Show Cause. The documents include

exact copies of parts of the grand jury testimony and other investigative materials disclosed by the government to Mr. Bragg.

Mr. Bragg admits that the documents contained in the exhibit, with the exception of one handwritten page, were provided by him to his client Avery. Mr. Bragg represents that the documents were contained in a written summary of the government's evidence that he prepared for his own use in defending the case. Mr. Bragg represents that, in preparing the summary, he electronically copied portions, including whole pages, of grand jury transcripts and other investigative materials provided to him by the government pursuant to the Discovery Order, and electronically inserted the copied sections into the summary. Finally, he admits that he provided this summary, including the copied material, to Avery in jail.

Mr. Bragg argues that his conduct did not violate the Discovery Order because he did not literally "photocopy" any of the materials disclosed to him. Instead, he contends that because he electronically copied portions of the investigative materials, which was not strictly forbidden by the Discovery Order by its use of the word "photocopy," he is not guilty of violating the order. In addition, he contends that he provided the material to Avery as part of his obligation to inform his client of the nature of the evidence against him.

The court has the inherent authority to control admission to its bar and sanction lawyers who appear before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). As the Supreme Court noted in *Chambers*, because of the potency of a court's inherent powers, the court must exercise them with restraint and discretion. *Id.* "A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at 44-45.

\*3 The undisputed evidence supports imposition of a sanction in this case. I find that Mr. Bragg's defense that his actions did not violate the

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Discovery Order, or at least that he reasonably so believed, is unsupportable. First, it is unreasonable to claim that electronic copying, i.e., "cutting and pasting," did not fall under the Discovery Order's ban on photocopying. The material found in Avery's cell contained pages of exact replicas of grand jury testimony and other investigative materials, copies in every sense of the word. There is no substantive difference between this and a copy made on a photocopy machine.

More importantly, the Discovery Order clearly stated that defense counsel "may not remove this material from the office of defense counsel unless kept in the personal possession of defense counsel at all times." ( Discovery Order 1.) The discovery material, however copied, was given to the client outside of Mr. Bragg's personal possession.

That Mr. Bragg's actions in leaving exact copies of the discovery material with his client in jail are obvious violations of the Discovery Order is all the more clear considering the purpose behind its limitations. In this district, the United States Attorney's office has generally adopted an "open file policy." In criminal cases, it is its practice, as sanctioned by the court, to turn over to defendants and their counsel its investigative materials. This benefits the government in that it encourages guilty pleas. It also benefits defendants in that they have access to the government's evidence against them and are better informed as to how to proceed with their case and trial. In order for this system to succeed, however, it is necessary to carefully protect the dissemination of the investigative materials. Significant harm may come to witnesses and other third parties when materials such as grand jury testimony, law enforcement reports and other such sensitive materials are circulated outside of defense counsel and the defendant. This risk is particularly pronounced in the context of the jail environment, where it is often the case, as it was here, that government informants are incarcerated along with defendants. Moreover, unauthorized distribution of grand jury testimony strikes at the core of grand

jury secrecy, a fundamental principle of the federal criminal justice system.

It is for these reasons that the standard Discovery Order contains strict restrictions on the dissemination of discovery materials received by the government. The obvious goal of the restrictions is to keep the discovery materials, or exact copies of them, from being shown or passed around by the defendant. Of course, the defendant has a right to know the evidence against him and defense counsel has a duty to show him the discovery materials and go over it with him. But to protect potential witnesses and government informants, those materials are not to leave the possession of defense counsel. It is one thing for a defendant to learn and repeat to others that someone has testified against him. It is quite another thing for a defendant to show his jail companions a copy of the witness's actual testimony. In this setting, the risk posed to such a witness is severe.

\*4 Mr. Bragg is an experienced criminal defense lawyer before this court. He was well aware not only of the language of the Discovery Order, but also of the reason for the order and its restrictions. He knew that the Discovery Order sought to protect potential witnesses and government informants from reprisals based on their statements. If Mr. Bragg's client had insisted on lengthy access to the discovery materials himself or if Mr. Bragg had felt that his client needed such access, he could have sought assistance from the court. He could have asked the court for permission to keep the material at the jail for his client to look at under the control of the jail authorities, or he could have asked for some other modification of the Discovery Order. He did not do this. Instead, he disregarded that order.

I decline, however, to hold Mr. Bragg in criminal contempt. I believe that his actions were aberrant behavior. Nevertheless, his conduct, however aberrant, was serious, and deserving of sanctions under the court's inherent authority.

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For the foregoing reasons, it is **ORDERED** as follows:

1. Michael A. Bragg is hereby reprimanded for his misconduct in violating the Discovery Order;

2. Mr. Bragg must not seek or accept payment of fee or expenses for his representation of defendant Avery; and

3. Mr. Bragg must pay a monetary sanction in the amount of \$350.00 within 30 days to the clerk of this court.

W.D.Va., 2012.

In re Bragg

Slip Copy, 2012 WL 566958 (W.D.Va.)

END OF DOCUMENT

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal No.
	)	
v.	)	STIPULATED DISCOVERY AND
	)	PROTECTIVE ORDER
	)	
	)	
Defendant.	)	

The following discovery and reciprocal discovery obligations have been agreed to by the parties and the Court so ORDERS such compliance:

1. ***Acknowledgment of Requests for Discovery.*** The parties acknowledge that Defendant has requested discovery from the Government, pursuant to Fed. R. Crim. P. 16(a) and 26.2 and 18 U.S.C. § 3500(b), and that the Government has requested reciprocal discovery from the Defendant, pursuant to Fed. R. Crim. P. 16(b) and 26.2. Defendant further acknowledges that the Government has requested notice of any alibi, Fed. R. Crim. P. 12.1, insanity defense, Fed. R. Crim. P. 12.2, or public authority defense, Fed. R. Crim. P. 12.3, and agrees to provide notice of such defenses within fourteen calendar days of this agreement, unless the Court specifically sets a different date upon application of the Defendant.<sup>1</sup>

2. ***Government's Rule 16(a) Discovery and other Physical Evidence.*** Upon execution and approval by the Court of this Agreement and Order, the Government will make available for review by Defendant's counsel any original physical evidence, financial records,

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<sup>1</sup>If Defendant's counsel requires further information about the time, date, and place of the alleged offense beyond the information set forth in the Indictment and the Government's discovery materials, Defendant's counsel will specifically notify Government counsel.

and other Rule 16(a) materials gathered during the investigation by whatever means, including by search warrant, grand jury subpoena, other legal process, or consent. These materials may be reviewed by scheduling an appointment during business hours at the United States Attorney's Office and/or at the law enforcement agency in possession of any original evidence. To the extent that these materials are not voluminous and may be conveniently copied, the Government may elect to provide copies of these materials to Defendant's counsel; otherwise, Defendant's counsel may make arrangements to make copies of these materials at Defendant's expense.<sup>2</sup>

3. ***Government's Witness Statements/Information and Brady Material.*** With respect to the Defendant, any co-defendants, and any witnesses reasonably anticipated to testify at trial, the Government will provide copies of law enforcement reports (excluding evaluative material of matters such as possible defenses and legal strategies), witness statements, and memoranda of witness interviews prepared by Government investigators (e.g., FBI 302s, DEA-6s, etc.), which provide the basis for the case against the Defendant. The Government also will provide copies of any *Brady* or Jencks Act materials (other than grand jury transcripts) of which the United States Attorney's Office is aware and possesses. These materials will be provided upon execution and approval of this Agreement, to be supplemented if and when additional materials become available. Should Defendant's counsel become aware of any potential *Brady* material not contained in the discovery file, Defendant's counsel will notify the United States Attorney's Office and request that such information be added to the discovery file.

4. ***Restrictions on Use and Disclosure.*** All materials provided under this

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<sup>2</sup>If dissemination or release of any of these materials is prohibited by law, *see, e.g.*, 18 U.S.C. § 3509(m), Defendant's counsel will not be permitted to copy them.

Agreement are for the limited purpose of being used in the above-captioned criminal case and may not be used or disclosed for any other purpose, including for any other civil or criminal case in federal or state court (other than proceedings arising from this prosecution under 28 U.S.C. § 2255), unless specifically permitted and ordered by the United States District Court for the Southern District of Iowa. These materials may be discussed with and shown to Defendant. However, copies of the following material, in any form<sup>3</sup>, may not be left with or provided to the Defendant or any other person (nor may Defendant be permitted to make copies of these materials): law enforcement reports, investigative reports and summaries, witness statements, memoranda of witness interviews, audio recordings, video recordings, and grand jury testimony and exhibits. Defense counsel also agrees not to show any such materials, memoranda, or witness interviews to any witness in the case, except for any transcribed testimony or written statement signed or expressly adopted by that witness. Copies of discovery materials provided to Defendant's counsel shall be either destroyed or returned<sup>3</sup> to Government counsel following the conclusion of all matters relating to this criminal case.

5. ***Redacted or Withheld Information.*** The Government may redact or withhold information from discovery for security concerns or to protect an ongoing investigation or, alternatively, may require that such materials be reviewed at the U.S. Attorney's Office and not copied; the Government also may redact certain personal identifying information, such as social security numbers and dates of birth, to protect the privacy interests of potential witnesses.<sup>4</sup> This

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<sup>3</sup>This includes both paper and electronic copies, as well as summaries or dictation that may be prepared by or on behalf of Defendant's counsel.

<sup>4</sup>To the extent that any discovery materials in this case contain personal identifying information of any person, such as social security numbers, dates of birth, or financial account

does not preclude the Defendant from requesting *in camera* review by the Court of such material, upon proper showing, in order to determine whether or not it should be disclosed in accordance with Fed. R. Crim. P. 16 or other legal authorities. Where information is withheld, a notice of the withholding, along with a general description of the type of material withheld, will be provided to Defendant's counsel. The Government also will not disclose evidence that it may elect to use for impeachment of defense witnesses or as possible rebuttal evidence.

6. ***Defendant's Reciprocal Discovery Obligations.*** Defendant agrees to provide the following reciprocal discovery materials within fourteen calendar days of this Agreement: Copies of documents, tangible objects, and other materials that Defendant may offer into evidence during its case-in-chief, reports of examinations and tests, and summaries of expert witnesses, to the full extent of Fed. R. Crim. P. 16(b); and, statements of any witness Defendant intends to call at trial, including any written statements or substantially verbatim, contemporaneously recorded recital of such prior statements to the full extent of Fed. R. Crim. P. 26.2(f) and 18 U.S.C. § 3500(e).

7. ***Notice Under Rules of Evidence and Criminal Procedure.*** Unless otherwise indicated, the general nature of information that the Government may offer into evidence pursuant to Federal Rules of Evidence 404(b) and 609(b) is set forth within the discovery materials. The undersigned counsel for the Defendant understands and agrees that the review of these materials provides the Defendant with necessary notice, in compliance with Federal Rule of Criminal Procedure 12(b)(4) and Federal Rules of Evidence 404(b) and 609(b), as to any and all

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information, or any person's medical records or information, Defendant's counsel agrees that these materials will be subject to the restrictions set forth in paragraph 4.

materials which are relevant to those rules. Upon a specific request by Defendant's counsel, however, the Government will specify whether it intends to use any such evidence, whether it will be offered pursuant to Rule 404(b), and the purpose for which it is offered under the rule without further motion or order.

8. ***Giglio Information.*** The Government will provide potential *Giglio* information relating to witnesses reasonably anticipated to be called during its case-in-chief and will, in advance of trial, run "rap" sheets of non-law enforcement witnesses reasonably anticipated to be called as witnesses during its case-in-chief. Any potential or alleged *Giglio* information related to law enforcement witnesses must be reviewed at the U.S. Attorney's Office and must remain at all time in the Government's custody; the Government reserves the right to submit such materials to the Court for *in camera* review to determine whether disclosure is required.

9. ***Grand Jury Testimony.*** The Government agrees to provide counsel for the Defendant with access to the grand jury testimony of witnesses reasonably anticipated to be called as witnesses at trial no later than ten calendar days before the scheduled trial date. If the Government elects to delay disclosure of grand jury transcripts until less than ten calendar days before trial, because of witness security concerns or other reasons, it will notify defense counsel. Any copies of grand jury testimony will be subject to the restrictions regarding law enforcement reports and witness statements, as set forth above. Defendant's counsel agrees not to move for a continuance of the trial date once the grand jury transcripts have been disclosed.

10. ***Materials Obtained by Trial Subpoena (Mutual Obligation).*** Any materials obtained pursuant to trial subpoenas issued by either party will be disclosed to all parties, in full, immediately upon receipt. The parties further acknowledge that neither party may require the

production of documents or other evidence prior to trial pursuant to a trial subpoena without obtaining a specific Court order, with notice to all parties, in accordance with Rule 17(c) of the Federal Rules of Criminal Procedure.

11. ***Witness and Exhibit Lists.*** The parties agree to exchange witness lists and exhibit lists no later than five calendar days before the scheduled trial date.

12. ***Continuing Obligation.*** The parties acknowledge that they are subject to a continuing duty of disclosure, including under Federal Rule of Criminal Procedure 16(c). The parties will promptly disclose any additional discovery materials under this Agreement – including Rule 16 materials, witness information, and *Brady* information – if additional materials are identified or obtained following execution of this Agreement or beyond the deadlines agreed herein. Any additional materials provided will be subject to the restrictions set forth in this Agreement. Opposing counsel will be notified when additional discovery materials are added.

13. ***Resolution of Disputes.*** The parties agree that they will attempt to resolve any disputes involving discovery and reciprocal discovery between themselves before filing any discovery-related motions (including motions for bills of particulars) with the Court, consistent with the requirements of Local Criminal Rule 16(b).

14. ***Applicability.*** Undersigned counsel for both parties agree that the terms and restrictions of this agreement extend to other lawyers, staff, and investigators working with or on behalf of the undersigned counsel (including, but not limited to, other employees or lawyers associated with defense counsel's law practice, and any investigators retained by or acting on behalf of the Defendant, as well as employees of the U.S. Attorney's Office and Government investigators assigned to this case). If different counsel is appointed or retained to represent

Defendant, the discovery materials provided under this Agreement shall not be released to new counsel until new counsel files a statement with the Court acknowledging that counsel will be bound to the terms of this Agreement. Any violation of this agreement will obligate the Defendant to immediately return any and all documents provided to the U.S. Attorney's Office.

15. **Authority and Scope.** The parties agree that the Court has the authority to enter and enforce this Order, including under the authority of Rule 16(d) of the Federal Rules of Criminal Procedure, and that this Order shall remain binding on all counsel, including any additional or new counsel that may appear on behalf of the Government or the Defendant after execution of this Agreement.

**IT IS SO ORDERED.**

Dated this        day of January 2012

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Honorable Ross A. Walters  
United States Magistrate Judge

SEEN AND AGREED:

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Date

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Attorney for the Defendant

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Date

---

Amy Jennings  
Assistant United States Attorney

FindLaw SUPREME COURT

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KeyCite this case on Westlaw

<http://laws.findlaw.com/us/000/10-444.html>

[Opinion]

## MISSOURI v. FRYE

certiorari to the court of appeals of missouri, western district

No. 10-444. Argued October 31, 2011--Decided March 21, 2012

Respondent Frye was charged with driving with a revoked license. Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum 4-year prison term. The prosecutor sent Frye's counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend, with a guilty plea, a 90-day sentence. Counsel did not convey the offers to Frye, and they expired. Less than a week before Frye's preliminary hearing, he was again arrested for driving with a revoked license. He subsequently pleaded guilty with no underlying plea agreement and was sentenced to three years in prison. Seeking postconviction relief in state court, he alleged his counsel's failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanor had he known of the offer. The court denied his motion, but the Missouri appellate court reversed, holding that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland v. Washington*, 466 U. S. 668. Specifically, the court found that defense counsel had been ineffective in not communicating the plea offers to Frye and concluded that Frye had shown that counsel's deficient performance caused him prejudice because he pleaded guilty to a felony instead of a misdemeanor.

Held:

1. The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to "all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U. S. 778, 786. *Hill v. Lockhart*, 474 U. S. 52, established that *Strickland's* two-part test governs ineffective-assistance claims in the plea bargain context. There, the defendant had alleged that his counsel had given him inadequate advice about his plea, but he failed to show that he would have proceeded to trial had he received the proper advice. 474 U. S., at 60. In *Padilla v. Kentucky*, 559 U. S. \_\_\_\_, where a plea offer was set aside because counsel had misinformed the defendant of its immigration consequences, this Court made clear that "the negotiation of a plea bargain is a critical" stage for ineffective-assistance purposes, *id.*, at \_\_\_\_, and rejected the argument made by the State in this case that a knowing and voluntary plea supersedes defense counsel's errors. The State attempts to distinguish *Hill* and *Padilla* from the instant case. It notes that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present, while no formal court proceedings are involved when a plea offer has lapsed or been rejected; and it insists that there is no right to receive a plea offer in any event. Thus, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies when the opportunities for a full and fair trial, or for a later guilty plea albeit on less favorable terms, are preserved. While these contentions are neither illogical nor without some persuasive force, they do not suffice to overcome the simple reality that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. Plea bargains have become so central to today's criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process. Pp. 3-8.

2. As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to this rule need not be addressed here, for the offer was a formal one with a fixed expiration date. Standards for prompt communication and consultation recommended by the American Bar Association and adopted by numerous state and federal courts, though not determinative, serve as important guides. The prosecution and trial courts may adopt measures to help ensure against late, frivolous, or fabricated claims. First, a formal offer's terms and processing can be documented. Second, States may require that all offers be in writing. Third, formal offers can be made part of the record at any subsequent plea proceeding or before trial to ensure that a defendant has been fully advised before the later proceedings commence. Here, as the result of counsel's deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty. Pp. 8-11.

3. To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law. This application of Strickland to uncommunicated, lapsed pleas does not alter Hill's standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U. S., at 59. Hill correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel's deficient performance during plea negotiations. Because Frye argues that with effective assistance he would have accepted an earlier plea offer as opposed to entering an open plea, Strickland's inquiry into whether "the result of the proceeding would have been different," 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial but at whether he would have accepted the earlier plea offer. He must also show that, if the prosecution had the discretion to cancel the plea agreement or the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is particularly important because a defendant has no right to be offered a plea, see *Weatherford v. Bursey*, 429 U. S. 545, 561, nor a federal right that the judge accept it, *Santobello v. New York*, 404 U. S. 257, 262. Missouri, among other States, appears to give the prosecution some discretion to cancel a plea agreement; and the Federal Rules of Criminal Procedure, some state rules, including Missouri's, and this Court's precedents give trial courts some leeway to accept or reject plea agreements. Pp. 11-13.

4. Applying these standards here, the Missouri court correctly concluded that counsel's failure to inform Frye of the written plea offer before it expired fell below an objective reasonableness standard, but it failed to require Frye to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court. These matters should be addressed by the Missouri appellate court in the first instance. Given that Frye's new offense for driving without a license occurred a week before his preliminary hearing, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it unless they were required by state law to do so. Pp. 13-15.

311 S. W. 3d 350, vacated and remanded.

Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined.

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 MISSOURI, PETITIONER v. GALIN E. FRYE S.Ct. 13-6493 Opinion of the Court 566 U. S. \_\_\_\_ (2012)  
 MISSOURI v. FRYE NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.  
 SUPREME COURT OF THE UNITED STATES No. 10-444

MISSOURI, PETITIONER v. GALIN E. FRYE

on writ of certiorari to the court of appeals of missouri, western district

[March 21, 2012]

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Justice Kennedy delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. See *Strickland v. Washington*, 466 U. S. 668, 686 (1984). This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance. Other questions relating to ineffective assistance with respect to plea offers, including the question of proper remedies, are considered in a second case decided today. See *Lafler v. Cooper*, post, at 3-16.

I

In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D

felony, which carries a maximum term of imprisonment of four years. See Mo. Rev. Stat. §§302.321.2, 558.011.1(4) (2011).

On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. App. 50. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called "shock" time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a 90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. 311 S. W. 3d 350, 360 (Mo. App. 2010). The letter stated both offers would expire on December 28. Frye's attorney did not advise Frye that the offers had been made. The offers expired. *Id.*, at 356.

Frye's preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. App. 47-48, 311 S. W. 3d, at 352-353. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying plea agreement. App. 5, 13, 16. The state trial court accepted Frye's guilty plea. *Id.*, at 21. The prosecutor recommended a 3-year sentence, made no recommendation regarding probation, and requested 10 days shock time in jail. *Id.*, at 22. The trial judge sentenced Frye to three years in prison. *Id.*, at 21, 23.

Frye filed for postconviction relief in state court. *Id.*, at 8, 25-29. He alleged his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer. *Id.*, at 34.

A state court denied the postconviction motion, *id.*, at 52-57, but the Missouri Court of Appeals reversed, 311 S. W. 3d 350. It determined that Frye met both of the requirements for showing a Sixth Amendment violation under Strickland. First, the court determined Frye's counsel's performance was deficient because the "record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window." 311 S. W. 3d, at 355, 356 (emphasis deleted). The court next concluded Frye had shown his counsel's deficient performance caused him prejudice because "Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year." *Id.*, at 360.

To implement a remedy for the violation, the court deemed Frye's guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari. 562 U. S. \_\_\_\_ (2011).

## II

### A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U. S. 778, 786 (2009) (quoting *United States v. Wade*, 388 U. S. 218, 227-228 (1967)). Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea. See *Hamilton v. Alabama*, 368 U. S. 52 (1961) (arraignment); *Massiah v. United States*, 377 U. S. 201 (1964) (postindictment interrogation); *Wade*, *supra* (postindictment lineup); *Argersinger v. Hamlin*, 407 U. S. 25 (1972) (guilty plea).

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: *Hill v. Lockhart*, 474 U. S. 52 (1985); and *Padilla v. Kentucky*, 559 U. S. \_\_\_\_ (2010).

*Hill* established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. See *Hill*, *supra*, at 57. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill*, *supra*, at 60.

In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U. S., at \_\_\_\_ (slip op., at 16). It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

In the case now before the Court the State, as petitioner, points out that the legal question presented is different from that in Hill and Padilla. In those cases the claim was that the prisoner's plea of guilty was invalid because counsel had provided incorrect advice pertinent to the plea. In the instant case, by contrast, the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel. The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers.

To give further support to its contention that the instant case is in a category different from what the Court considered in Hill and Padilla, the State urges that there is no right to a plea offer or a plea bargain in any event. See *Weatherford v. Bursey*, 429 U. S. 545, 561 (1977). It claims Frye therefore was not deprived of any legal benefit to which he was entitled. Under this view, any wrongful or mistaken action of counsel with respect to earlier plea offers is beside the point.

The State is correct to point out that Hill and Padilla concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present. Before a guilty plea is entered the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. See, e.g., Fed. Rule Crim. Proc. 11; Mo. Sup. Ct. Rule 24.02 (2004). Hill and Padilla both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

When a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event. And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.

The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (all Internet materials as visited Mar. 1, 2012, and available in Clerk of Court's case file); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, *Felony Sentences in State Courts, 2006-Statistical Tables*, p. 1 (NCJ226846, rev. Nov. 2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>; Padilla, *supra*, at \_\_\_\_ (slip op., at 15) (recognizing pleas account for nearly 95% of all criminal convictions). The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," Lafler, *post*, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system." Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, *Separation of*

Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." Massiah, 377 U. S., at 204 (quoting Spano v. New York, 360 U. S. 315, 326 (1959) (Douglas, J., concurring)).

B

The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. "The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision." *Premo v. Moore*, 562 U. S. \_\_\_\_ (2011) (slip op., at 8-9). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process. Cf. *ibid.*

This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects, however. Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney," ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years. See, e.g., *Davie v. State*, 381 S. C. 601, 608-609, 675 S. E. 2d 416, 420 (2009); *Cottle v. State*, 733 So. 2d 963, 965-966 (Fla. 1999); *Becton v. Hun*, 205 W. Va. 139, 144, 516 S. E. 2d 762, 767 (1999); *Harris v. State*, 875 S. W. 2d 662, 665 (Tenn. 1994); *Lloyd v. State*, 258 Ga. 645, 648, 373 S. E. 2d 1, 3 (1988); *United States v. Rodriguez Rodriguez*, 929 F. 2d 747, 752 (CA1 1991) (per curiam); *Pham v. United States*, 317 F. 3d 178, 182 (CA2 2003); *United States ex rel. Caruso v. Zelinsky*, 689 F. 2d 435, 438 (CA3 1982); *Griffin v. United States*, 330 F. 3d 733, 737 (CA6 2003); *Johnson v. Duckworth*, 793 F. 2d 898, 902 (CA7 1986); *United States v. Blaylock*, 20 F. 3d 1458, 1466 (CA9 1994); cf. *Diaz v. United States*, 930 F. 2d 832, 834 (CA11 1991). The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys. See, e.g., Fla. Rule Regulating Bar 4-1.4 (2008); Ill. Rule Prof. Conduct 1.4 (2011); Kan. Rule Prof. Conduct 1.4 (2010); Ky. Sup. Ct. Rule 3.130, Rule Prof. Conduct 1.4 (2011); Mass. Rule Prof. Conduct 1.4 (2011-2012); Mich. Rule Prof. Conduct 1.4 (2011).

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N. J. Ct. Rule 3:9-1(b) (2012) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney"). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before trial. See Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 20 (discussing hearings in Arizona conducted pursuant to *State v. Donald*, 198 Ariz. 406, 10 P. 3d 1193 (App. 2000)); see also N. J. Ct. Rules 3:9-1(b), (c) (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); *In re Alvernaz*, 2 Cal. 4th 924, 938, n. 7, 830 P. 2d

747, 756, n. 7 (1992) (encouraging parties to "memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, . . . and (3) the defendant's response to the plea bargain offer"); Brief for Center on the Administration of Criminal Law, New York University School of Law as Amicus Curiae 25-27.

Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed. Under Strickland, the question then becomes what, if any, prejudice resulted from the breach of duty.

### C

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. *Glover v. United States*, 531 U. S. 198, 203 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

This application of Strickland to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*. In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U. S., at 59. *Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations. Unlike the defendant in *Hill*, Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years' imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, Strickland's inquiry into whether "the result of the proceeding would have been different," 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of Strickland prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea, see *Weatherford*, 429 U. S., at 561, nor a federal right that the judge accept it, *Santobello v. New York*, 404 U. S. 257, 262 (1971). In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed, see, e.g., 311 S. W. 3d, at 359 (case below); *Ariz. Rule Crim. Proc. 17.4(b)* (Supp. 2011). The Federal Rules, some state rules including in Missouri, and this Court's precedents give trial courts some leeway to accept or reject plea agreements, see *Fed. Rule Crim. Proc. 11(c)(3)*; see *Mo. Sup. Ct. Rule 24.02(d)(4)*; *Boykin v. Alabama*, 395 U. S. 238, 243-244 (1969). It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

### III

These standards must be applied to the instant case. As regards the deficient performance prong of Strickland, the Court of Appeals found the "record is void of any evidence of any effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so." 311 S. W. 3d, at 356. On this record, it is evident that Frye's attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. See *supra*, at 2. The Missouri Court of Appeals was correct that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, *supra*, at 688.

The Court of Appeals erred, however, in articulating the precise standard for prejudice in this context. As noted, a defendant in Frye's position must show not only a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court. Frye can show he would have accepted

the offer, but there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.

There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor. It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution's case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him. Here, however, that is not the case. The Court of Appeals did not err in finding Frye's acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it, and there is no need to address here the showings that might be required in other cases.

The Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court. Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters. The Court has established the minimum requirements of the Sixth Amendment as interpreted in *Strickland*, and States have the discretion to add procedural protections under state law if they choose. A State may choose to preclude the prosecution from withdrawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting a plea bargain. In Missouri, it appears "a plea offer once accepted by the defendant can be withdrawn without recourse" by the prosecution. 311 S. W. 3d, at 359. The extent of the trial court's discretion in Missouri to reject a plea agreement appears to be in some doubt. Compare *id.*, at 360, with Mo. Sup. Ct. Rule 24.02(d)(4).

We remand for the Missouri Court of Appeals to consider these state-law questions, because they bear on the federal question of *Strickland* prejudice. If, as the Missouri court stated here, the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice. Likewise, if the trial court could have refused to accept the plea agreement, and if Frye fails to show a reasonable probability the trial court would have accepted the plea, there is no *Strickland* prejudice. In this case, given Frye's new offense for driving without a license on December 30, 2007, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it at the January 4, 2008, hearing, unless they were required by state law to do so.

It is appropriate to allow the Missouri Court of Appeals to address this question in the first instance. The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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Scalia, J., dissenting 566 U. S. \_\_\_\_ (2012) MISSOURI v. FRYE SUPREME COURT OF THE UNITED STATES No. 10-444

MISSOURI, PETITIONER v. GALIN E. FRYE

on writ of certiorari to the court of appeals of missouri, western district

[March 21, 2012]

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Justice Scalia, with whom The Chief Justice, Justice Thomas, and Justice Alito join, dissenting.

This is a companion case to *Lafler v. Cooper*, post, p. \_\_\_\_\_. The principal difference between the cases is that the fairness of the defendant's conviction in *Lafler* was established by a full trial and jury verdict, whereas Frye's conviction here was established by his own admission of guilt, received by the court after the usual colloquy that assured it was voluntary and truthful. In *Lafler* all that could be said (and as I discuss there it was quite enough) is that the fairness of the conviction was clear, though a unanimous jury finding beyond a reasonable doubt can sometimes be wrong. Here it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction. Thus, as far as the reasons for my dissent are concerned, this is an *fortiori* case. I will not repeat here the constitutional points that I discuss at length in *Lafler*, but I will briefly apply those points to the facts here and comment upon a few statements in the Court's analysis.

\* \* \*

Galin Frye's attorney failed to inform him about a plea offer, and Frye ultimately pleaded guilty without the benefit of a deal. Counsel's mistake did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place. So little entitlement that, had he known of and accepted the bargain, the prosecution would have been able to

withdraw it right up to the point that his guilty plea pursuant to the bargain was accepted. See 311 S. W. 3d 350, 359, and n. 4 (Mo. App. 2010).

The Court acknowledges, moreover, that Frye's conviction was untainted by attorney error: "[T]he guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel." Ante, at 5. Given the "ultimate focus" of our ineffective-assistance cases on "the fundamental fairness of the proceeding whose result is being challenged," *Strickland v. Washington*, 466 U. S. 668, 696 (1984), that should be the end of the matter. Instead, here, as in *Lafler*, the Court mechanically applies an outcome-based test for prejudice, and mistakes the possibility of a different result for constitutional injustice. As I explain in *Lafler*, post, p. \_\_\_\_ (dissenting opinion), that approach is contrary to our precedents on the right to effective counsel, and for good reason.

The Court announces its holding that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution" as though that resolves a disputed point; in reality, however, neither the State nor the Solicitor General argued that counsel's performance here was adequate. Ante, at 9. The only issue was whether the inadequacy deprived Frye of his constitutional right to a fair trial. In other cases, however, it will not be so clear that counsel's plea-bargaining skills, which must now meet a constitutional minimum, are adequate. "[H]ow to define the duty and responsibilities of defense counsel in the plea bargain process," the Court acknowledges, "is a difficult question," since "[b]argaining is, by its nature, defined to a substantial degree by personal style." Ante, at 8. Indeed. What if an attorney's "personal style" is to establish a reputation as a hard bargainer by, for example, advising clients to proceed to trial rather than accept anything but the most favorable plea offers? It seems inconceivable that a lawyer could compromise his client's constitutional rights so that he can secure better deals for other clients in the future; does a hard-bargaining "personal style" now violate the Sixth Amendment? The Court ignores such difficulties, however, since "[t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects." Ante, at 8. Perhaps not. But it does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet by-and-by.

While the inadequacy of counsel's performance in this case is clear enough, whether it was prejudicial (in the sense that the Court's new version of *Strickland* requires) is not. The Court's description of how that question is to be answered on remand is alone enough to show how unwise it is to constitutionalize the plea-bargaining process. Prejudice is to be determined, the Court tells us, by a process of retrospective crystal-ball gazing posing as legal analysis. First of all, of course, we must estimate whether the defendant would have accepted the earlier plea bargain. Here that seems an easy question, but as the Court acknowledges, ante, at 14, it will not always be. Next, since Missouri, like other States, permits accepted plea offers to be withdrawn by the prosecution (a reality which alone should suffice, one would think, to demonstrate that Frye had no entitlement to the plea bargain), we must estimate whether the prosecution would have withdrawn the plea offer. And finally, we must estimate whether the trial court would have approved the plea agreement. These last two estimations may seem easy in the present case, since Frye committed a new infraction before the hearing at which the agreement would have been presented; but they assuredly will not be easy in the mine run of cases.

The Court says "[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences." Ante, at 13. Assuredly it can, just as it can be assumed that the sun rises in the west; but I know of no basis for the assumption. Virtually no cases deal with the standards for a prosecutor's withdrawal from a plea agreement beyond stating the general rule that a prosecutor may withdraw any time prior to, but not after, the entry of a guilty plea or other action constituting detrimental reliance on the defendant's part. See, e.g., *United States v. Kuchinski*, 469 F. 3d 853, 857-858 (CA9 2006). And cases addressing trial courts' authority to accept or reject plea agreements almost universally observe that a trial court enjoys broad discretion in this regard. See, e.g., *Missouri v. Banks*, 135 S. W. 3d 497, 500 (Mo. App. 2004) (trial court abuses its discretion in rejecting a plea only if the decision "is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration" (internal quotation marks omitted)). Of course after today's opinions there will be cases galore, so the Court's assumption would better be cast as an optimistic prediction of the certainty that will emerge, many years hence, from our newly created constitutional field of plea-bargaining law. Whatever the "boundaries" ultimately devised (if that were possible), a vast amount of discretion will still remain, and it is extraordinary to make a defendant's constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, would have been exercised.

The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction. "The Constitution . . . is not an all-purpose tool for judicial construction of a perfect world; and when we

ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed." *Padilla v. Kentucky*, 559 U.S. \_\_\_, \_\_\_ (2010) (Scalia, J., dissenting) (slip op., at 1). In this case and its companion, the Court's sledge may require the reversal of perfectly valid, eminently just, convictions. A legislature could solve the problems presented by these cases in a much more precise and efficient manner. It might begin, for example, by penalizing the attorneys who made such grievous errors. That type of sub-constitutional remedy is not available to the Court, which is limited to penalizing (almost) everyone else by reversing valid convictions or sentences. Because that result is inconsistent with the Sixth Amendment and decades of our precedent, I respectfully dissent.

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[Opinion]

## LAFLER v. COOPER

certiorari to the united states court of appeals for the sixth circuit

No. 10-209. Argued October 31, 2011--Decided March 21, 2012

Respondent was charged under Michigan law with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges and to recommend a 51-to-85-month sentence on the other two, in exchange for a guilty plea. In a communication with the court, respondent admitted his guilt and expressed a willingness to accept the offer. But he rejected the offer, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. At trial, respondent was convicted on all counts and received a mandatory minimum 185-to-360-month sentence. In a subsequent hearing, the state trial court rejected respondent's claim that his attorney's advice to reject the plea constituted ineffective assistance. The Michigan Court of Appeals affirmed, rejecting the ineffective-assistance claim on the ground that respondent knowingly and intelligently turned down the plea offer and chose to go to trial. Respondent renewed his claim in federal habeas. Finding that the state appellate court had unreasonably applied the constitutional effective-assistance standards laid out in *Strickland v. Washington*, 466 U. S. 668, and *Hill v. Lockhart*, 474 U. S. 52, the District Court granted a conditional writ and ordered specific performance of the original plea offer. The Sixth Circuit affirmed. Applying *Strickland*, it found that counsel had provided deficient performance by advising respondent of an incorrect legal rule, and that respondent suffered prejudice because he lost the opportunity to take the more favorable sentence offered in the plea.

Held:

1. Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. Pp. 3-11.

(a) Because the parties agree that counsel's performance was deficient, the only question is how to apply *Strickland's* prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. Pp. 3-4.

(b) In that context, the *Strickland* prejudice test requires a defendant to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. The Sixth Circuit and other federal appellate courts have agreed with the *Strickland* prejudice test for rejected pleas adopted here by this Court. Petitioner and the Solicitor General propose a narrow view--that *Strickland* prejudice cannot arise from plea bargaining if the defendant is later convicted at a fair trial--but their reasoning is unpersuasive. First, they claim that the Sixth Amendment's sole purpose is to protect the right to a fair trial, but the Amendment actually requires effective assistance at critical stages of a criminal proceeding, including pretrial stages. This is consistent with the right to effective assistance on appeal, see, e.g., *Halbert v. Michigan*, 545 U. S. 605, and the right to counsel during sentencing, see, e.g., *Glover v. United States*, 531 U. S. 198, 203-204. This Court has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at trial, but has instead inquired whether the trial cured the particular error at issue. See, e.g., *Vasquez v. Hillery*, 474 U. S. 254, 263. Second, this Court has previously rejected petitioner's argument that *Lockhart v. Fretwell*, 506 U. S. 364, modified *Strickland* and does so again here. *Fretwell* and *Nix v. Whiteside*, 475 U. S. 157, demonstrate that "it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice,'" *Williams v. Taylor*, 529 U. S. 362, 391-392, where defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, respondent seeks relief from counsel's failure to meet a valid legal standard. Third, petitioner seeks to preserve the conviction by arguing that the Sixth Amendment's purpose is to ensure a conviction's reliability, but this argument fails to comprehend the full scope of the Sixth Amendment and is refuted by precedent. Here, the question is the fairness or reliability not of the trial but of the processes that preceded it, which caused respondent to lose benefits he would have received but for counsel's ineffective assistance. Furthermore, a reliable trial may not foreclose relief when counsel has failed to assert rights that may have altered the outcome. See *Kimmelman v. Morrison*, 477 U. S. 365, 379. Petitioner's position that a fair trial wipes clean ineffective assistance during

plea bargaining also ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. See *Missouri v. Frye*, ante, at \_\_\_\_\_. Pp. 4-11.

2. Where a defendant shows ineffective assistance has caused the rejection of a plea leading to a more severe sentence at trial, the remedy must "neutralize the taint" of a constitutional violation, *United States v. Morrison*, 449 U. S. 361, 365, but must not grant a windfall to the defendant or needlessly squander the resources the State properly invested in the criminal prosecution, see *United States v. Mechanik*, 475 U. S. 66, 72. If the sole advantage is that the defendant would have received a lesser sentence under the plea, the court should have an evidentiary hearing to determine whether the defendant would have accepted the plea. If so, the court may exercise discretion in determining whether the defendant should receive the term offered in the plea, the sentence received at trial, or something in between. However, resentencing based on the conviction at trial may not suffice, e.g., where the offered guilty plea was for less serious counts than the ones for which a defendant was convicted after trial, or where a mandatory sentence confines a judge's sentencing discretion. In these circumstances, the proper remedy may be to require the prosecution to reoffer the plea. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea, or leave the conviction undisturbed. In either situation, a court must weigh various factors. Here, it suffices to give two relevant considerations. First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to disregard any information concerning the crime discovered after the plea offer was made. Petitioner argues that implementing a remedy will open the floodgates to litigation by defendants seeking to unsettle their convictions, but in the 30 years that courts have recognized such claims, there has been no indication that the system is overwhelmed or that defendants are receiving windfalls as a result of strategically timed Strickland claims. In addition, the prosecution and trial courts may adopt measures to help ensure against meritless claims. See *Frye*, ante, at \_\_\_\_\_. Pp. 11-14.

3. This case arises under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but because the Michigan Court of Appeals' analysis of respondent's ineffective-assistance-of-counsel claim was contrary to clearly established federal law, AEDPA presents no bar to relief. Respondent has satisfied Strickland's two-part test. The parties concede the fact of deficient performance. And respondent has shown that but for that performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, he received a minimum sentence  $\frac{3}{2}$  times greater than he would have received under the plea. As a remedy, the District Court ordered specific performance of the plea agreement, but the correct remedy is to order the State to reoffer the plea. If respondent accepts the offer, the state trial court can exercise its discretion in determining whether to vacate respondent's convictions and resentence pursuant to the plea agreement, to vacate only some of the convictions and resentence accordingly, or to leave the conviction and sentence resulting from the trial undisturbed. Pp. 14-16.

376 Fed. Appx. 563, vacated and remanded.

Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, and in which Roberts, C. J., joined as to all but Part IV. Alito, J., filed a dissenting opinion.

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Opinion of the Court 566 U. S. \_\_\_\_ (2012) LAFLE v. COOPER NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press. SUPREME COURT OF THE UNITED STATES No. 10-209  
BLAINE LAFLE, PETITIONER v. ANTHONY COOPER

on writ of certiorari to the united states court of appeals for the sixth circuit

[March 21, 2012]

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Justice Kennedy delivered the opinion of the Court.

In this case, as in *Missouri v. Frye*, ante, p. \_\_\_\_, also decided today, a criminal defendant seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome. In *Frye*, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. Here, the favorable plea offer was reported to the client but, on advice of counsel, was rejected. In *Frye* there was a later guilty plea. Here, after the plea offer had been rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain. The instant case comes to the Court with the concession that counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment, applicable to the States through the Fourteenth Amendment.

## I

On the evening of March 25, 2003, respondent pointed a gun toward Kali Mundy's head and fired. From the record, it is unclear why respondent did this, and at trial it was suggested that he might have acted either in self-defense or in defense of another person. In any event the shot missed and Mundy fled. Respondent followed in pursuit, firing repeatedly. Mundy was shot in her buttock, hip, and abdomen but survived the assault.

Respondent was charged under Michigan law with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea. In a communication with the court respondent admitted guilt and expressed a willingness to accept the offer. Respondent, however, later rejected the offer on both occasions, allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist. On the first day of trial the prosecution offered a significantly less favorable plea deal, which respondent again rejected. After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment.

In a so-called Ginther hearing before the state trial court, see *People v. Ginther*, 390 Mich. 436, 212 N. W. 2d 922 (1973), respondent argued his attorney's advice to reject the plea constituted ineffective assistance. The trial judge rejected the claim, and the Michigan Court of Appeals affirmed. *People v. Cooper*, No. 250583, 2005 WL 599740 (Mar. 15, 2005) (per curiam), App. to Pet. for Cert. 44a. The Michigan Court of Appeals rejected the claim of ineffective assistance of counsel on the ground that respondent knowingly and intelligently rejected two plea offers and chose to go to trial. The Michigan Supreme Court denied respondent's application for leave to file an appeal. *People v. Cooper*, 474 Mich. 905, 705 N. W. 2d 118 (2005) (table).

Respondent then filed a petition for federal habeas relief under 28 U. S. C. §2254, renewing his ineffective-assistance-of-counsel claim. After finding, as required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), that the Michigan Court of Appeals had unreasonably applied the constitutional standards for effective assistance of counsel laid out in *Strickland v. Washington*, 466 U. S. 668 (1984), and *Hill v. Lockhart*, 474 U. S. 52 (1985), the District Court granted a conditional writ. *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712, \*10 (ED Mich., Mar. 26, 2009), App. to Pet. for Cert. 41a-42a. To remedy the violation, the District Court ordered "specific performance of [respondent's] original plea agreement, for a minimum sentence in the range of fifty-one to eighty-five months." *Id.*, at \*9, App. to Pet. for Cert. 41a.

The United States Court of Appeals for the Sixth Circuit affirmed, 376 Fed. Appx. 563 (2010), finding "[e]ven full deference under AEDPA cannot salvage the state court's decision," *id.*, at 569. Applying *Strickland*, the Court of Appeals found that respondent's attorney had provided deficient performance by informing respondent of "an incorrect legal rule," 376 Fed. Appx., at 570-571, and that respondent suffered prejudice because he "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him." *Id.*, at 573. This Court granted certiorari. 562 U. S. \_\_\_\_ (2011).

## II

## A

Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye*, ante, at 8; see also *Padilla v. Kentucky*, 559 U. S. \_\_\_\_ (2010) (slip op., at 16); *Hill*, supra, at 57. During plea negotiations defendants are "entitled to the effective assistance of competent counsel." *McMann v. Richardson*, 397 U. S. 759, 771 (1970). In *Hill*, the Court held "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U. S., at 58. The performance prong of *Strickland* requires a defendant to show "that counsel's representation fell below an objective standard of reasonableness." 474 U. S., at 57 (quoting *Strickland*, 466 U. S., at 688). In this case all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue.

The question for this Court is how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.

## B

To establish Strickland prejudice a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. See *Frye*, ante, at 12 (noting that Strickland's inquiry, as applied to advice with respect to plea bargains, turns on "whether the result of the proceeding would have been different" (quoting Strickland, supra, at 694)); see also *Hill*, 474 U. S., at 59 ("The . . . 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process"). In *Hill*, when evaluating the petitioner's claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court required the petitioner to show "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Ibid.*

In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for Strickland prejudice in the context of a rejected plea bargain. This is consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. See 376 Fed. Appx., at 571-573; see also, e.g., *United States v. Rodriguez Rodriguez*, 929 F. 2d 747, 753, n. 1 (CA1 1991) (per curiam); *United States v. Gordon*, 156 F. 3d 376, 380-381 (CA2 1998) (per curiam); *United States v. Day*, 969 F. 2d 39, 43-45 (CA3 1992); *Beckham v. Wainwright*, 639 F. 2d 262, 267 (CA5 1981); *Julian v. Bartley*, 495 F. 3d 487, 498-500 (CA7 2007); *Wanatee v. Ault*, 259 F. 3d 700, 703-704 (CA8 2001); *Nunes v. Mueller*, 350 F. 3d 1045, 1052-1053 (CA9 2003); *Williams v. Jones*, 571 F. 3d 1086, 1094-1095 (CA10 2009) (per curiam); *United States v. Gaviria*, 116 F. 3d 1498, 1512-1514 (CA10 1997) (per curiam).

Petitioner and the Solicitor General propose a different, far more narrow, view of the Sixth Amendment. They contend there can be no finding of Strickland prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. The three reasons petitioner and the Solicitor General offer for their approach are unpersuasive.

First, petitioner and the Solicitor General claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself. See Brief for Petitioner 12-21; Brief for United States as Amicus Curiae 10-12. The Sixth Amendment, however, is not so narrow in its reach. Cf. *Frye*, ante, at 11 (holding that a defendant can show prejudice under Strickland even absent a showing that the deficient performance precluded him from going to trial). The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U. S. 218, 226 (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, e.g., *Halbert v. Michigan*, 545 U. S. 605 (2005); *Evitts v. Lucey*, 469 U. S. 387 (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover v. United States*, 531 U. S. 198, 203-204 (2001); *Mempa v. Rhay*, 389 U. S. 128 (1967), and capital cases, see *Wiggins v. Smith*, 539 U. S. 510, 538 (2003). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Glover*, supra, at 203.

The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue. Thus, in *Vasquez v. Hillery*, 474 U. S. 254 (1986), the deliberate exclusion of all African-Americans from a grand jury was prejudicial because a defendant may have been tried on charges that would not have been brought at all by a properly constituted grand jury. *Id.*, at 263; see *Ballard v. United States*, 329 U. S. 187, 195 (1946) (dismissing an indictment returned by a grand jury from which women were excluded); see also *Stirone v. United States*, 361 U. S. 212, 218-219 (1960) (reversing a defendant's conviction because the jury may have based its verdict on acts not charged in the indictment). By contrast, in *United States v. Mechanik*, 475 U. S. 66 (1986), the complained-of error was a violation of a grand jury rule meant to ensure probable cause

existed to believe a defendant was guilty. A subsequent trial, resulting in a verdict of guilt, cured this error. See *id.*, at 72-73.

In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one  $\frac{3}{2}$  times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Second, petitioner claims this Court refined Strickland's prejudice analysis in *Fretwell* to add an additional requirement that the defendant show that ineffective assistance of counsel led to his being denied a substantive or procedural right. Brief for Petitioner 12-13. The Court has rejected the argument that *Fretwell* modified Strickland before and does so again now. See *Williams v. Taylor*, 529 U. S. 362, 391 (2000) ("The Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell*, 506 U. S. 364 (1993), modified or in some way supplanted the rule set down in Strickland"); see also *Glover*, *supra*, at 203 ("The Court explained last Term [in *Williams*] that our holding in *Lockhart* does not supplant the Strickland analysis").

*Fretwell* could not show Strickland prejudice resulting from his attorney's failure to object to the use of a sentencing factor the Eighth Circuit had erroneously (and temporarily) found to be impermissible. *Fretwell*, 506 U. S., at 373. Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, *Fretwell* could not demonstrate an error entitling him to relief. The case presented the "unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Ibid.* (O'Connor, J., concurring). See also *ibid.* (recognizing "[t]he determinative question--whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different--remains unchanged" (internal quotation marks and citation omitted)). It is for this same reason a defendant cannot show prejudice based on counsel's refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. See *Nix v. Whiteside*, 475 U. S. 157, 175 (1986) (holding first that counsel's refusal to present perjured testimony breached no professional duty and second that it cannot establish prejudice under Strickland).

Both *Fretwell* and *Nix* are instructive in that they demonstrate "there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice,'" *Williams*, *supra*, at 391-392, because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, the injured client seeks relief from counsel's failure to meet a valid legal standard, not from counsel's refusal to violate it. He maintains that, absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice. The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel. See *Bibas*, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011) ("The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain"); see also *Frye*, *ante*, at 7-8. If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

It is, of course, true that defendants have "no right to be offered a plea . . . nor a federal right that the judge accept it." *Frye*, *ante*, at 12. In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. See *Evitts*, 469 U. S. 387; see also *Douglas v. California*, 372 U. S. 353 (1963). As in those cases, "[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Evitts*, *supra*, at 401.

Third, petitioner seeks to preserve the conviction obtained by the State by arguing that the purpose of the Sixth Amendment is to ensure "the reliability of [a] conviction following trial." Brief for Petitioner 13. This argument, too, fails to comprehend the full scope of the Sixth Amendment's protections; and it is refuted by precedent. Strickland recognized "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U. S., at 686. The goal of a just result is not divorced from the reliability of a conviction, see *United States v. Cronin*, 466 U. S. 648, 658 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the

processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome. In *Kimmelman v. Morrison*, 477 U. S. 365 (1986), the Court held that an attorney's failure to timely move to suppress evidence during trial could be grounds for federal habeas relief. The Court rejected the suggestion that the "failure to make a timely request for the exclusion of illegally seized evidence" could not be the basis for a Sixth Amendment violation because the evidence "is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'" *Id.*, at 379 (quoting *Stone v. Powell*, 428 U. S. 465, 490 (1976)). "The constitutional rights of criminal defendants," the Court observed, "are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." 477 U. S., at 380. The same logic applies here. The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining.

In the end, petitioner's three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See *Frye*, ante, at 7. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. *Ibid.* ("[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

### C

Even if a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy. That question must now be addressed.

Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U. S. 361, 364 (1981). Thus, a remedy must "neutralize the taint" of a constitutional violation, *id.*, at 365, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. See *Mechanik*, 475 U. S., at 72 ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences").

The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. See, e.g., *Williams*, 571 F. 3d, at 1088; *Riggs v. Fairman*, 399 F. 3d 1179, 1181 (CA9 2005). In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion. At this point, however, it suffices to note two considerations that are of relevance.

First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered

after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Petitioner argues that implementing a remedy here will open the floodgates to litigation by defendants seeking to unsettle their convictions. See Brief for Petitioner 20. Petitioner's concern is misplaced. Courts have recognized claims of this sort for over 30 years, see *supra*, at 5, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed Strickland claims. See also *Padilla*, 559 U. S., at \_\_\_ (slip op., at 14) ("We confronted a similar 'floodgates' concern in *Hill*," but a "flood did not follow in that decision's wake"). In addition, the "prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction." *Frye*, ante, at 10. See also *ibid.* (listing procedures currently used by various States). This, too, will help ensure against meritless claims.

### III

The standards for ineffective assistance of counsel when a defendant rejects a plea offer and goes to trial must now be applied to this case. Respondent brings a federal collateral challenge to a state-court conviction. Under AEDPA, a federal court may not grant a petition for a writ of habeas corpus unless the state court's adjudication on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). A decision is contrary to clearly established law if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams v. Taylor*, 529 U. S. 362, 405 (2000) (opinion for the Court by O'Connor, J.). The Court of Appeals for the Sixth Circuit could not determine whether the Michigan Court of Appeals addressed respondent's ineffective-assistance-of-counsel claim or, if it did, "what the court decided, or even whether the correct legal rule was identified." 376 Fed. Appx., at 568-569.

The state court's decision may not be quite so opaque as the Court of Appeals for the Sixth Circuit thought, yet the federal court was correct to note that AEDPA does not present a bar to granting respondent relief. That is because the Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply Strickland to assess it. Rather than applying Strickland, the state court simply found that respondent's rejection of the plea was knowing and voluntary. *Cooper*, 2005 WL 599740, \*1, App. to Pet. for Cert. 45a. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel. See *Hill*, 474 U. S., at 370 (applying Strickland to assess a claim of ineffective assistance of counsel arising out of the plea negotiation process). After stating the incorrect standard, moreover, the state court then made an irrelevant observation about counsel's performance at trial and mischaracterized respondent's claim as a complaint that his attorney did not obtain a more favorable plea bargain. By failing to apply Strickland to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law. And in that circumstance the federal courts in this habeas action can determine the principles necessary to grant relief. See *Panetti v. Quarterman*, 551 U. S. 930, 948 (2007).

Respondent has satisfied Strickland's two-part test. Regarding performance, perhaps it could be accepted that it is unclear whether respondent's counsel believed respondent could not be convicted for assault with intent to murder as a matter of law because the shots hit Mundy below the waist, or whether he simply thought this would be a persuasive argument to make to the jury to show lack of specific intent. And, as the Court of Appeals for the Sixth Circuit suggested, an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance. Here, however, the fact of deficient performance has been conceded by all parties. The case comes to us on that assumption, so there is no need to address this question.

As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. See 376 Fed. Appx., at 571-572. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The standard for ineffective assistance under Strickland has thus been satisfied.

As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. See *Mich. Ct. Rule 6.302(C)(3)* (2011) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or

a prosecutorial sentence recommendation, the court may . . . reject the agreement"). Today's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.

The judgment of the Court of Appeals for the Sixth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Scalia, J., dissenting 566 U. S. \_\_\_\_ (2012) LAFLE v. COOPER SUPREME COURT OF THE UNITED STATES No. 10-209

BLAINE LAFLE, PETITIONER v. ANTHONY COOPER

on writ of certiorari to the united states court of appeals for the sixth circuit

[March 21, 2012]

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Justice Scalia, with whom Justice Thomas joins, and with whom The Chief Justice joins as to all but Part IV, dissenting.

"If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Ante*, at 9.

"The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. . . . Bargaining is, by its nature, defined to a substantial degree by personal style. . . . This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects. . . ." *Missouri v. Frye*, *ante*, at 8.

With those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice. See *Friendly, The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929 (1965). The Court now moves to bring perfection to the alternative in which prosecutors and defendants have sought relief. Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process. And it would be foolish to think that "constitutional" rules governing counsel's behavior will not be followed by rules governing the prosecution's behavior in the plea-bargaining process that the Court today announces "is the criminal justice system," *Frye*, *ante*, at 7 (quoting approvingly from *Scott & Stuntz, Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912 (1992) (hereinafter *Scott*)). Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak--thereby excluding the defendant from "the criminal justice system"?

Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer caused him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a new rule of law, which does not undermine the Michigan Court of Appeals' decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces--namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all--is unheard-of and quite absurd for violation of a constitutional right. I respectfully dissent.

I

This case and its companion, *Missouri v. Frye*, *ante*, p. \_\_\_\_, raise relatively straightforward questions about the scope of the right to effective assistance of counsel. Our case law originally derived that right

from the Due Process Clause, and its guarantee of a fair trial, see *United States v. Gonzalez-Lopez*, 548 U. S. 140, 147 (2006), but the seminal case of *Strickland v. Washington*, 466 U. S. 668 (1984), located the right within the Sixth Amendment. As the Court notes, ante, at 6, the right to counsel does not begin at trial. It extends to "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U. S. 218, 226 (1967). Applying that principle, we held that the "entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres." *Iowa v. Tovar*, 541 U. S. 77, 81 (2004); see also *Hill v. Lockhart*, 474 U. S. 52, 58 (1985). And it follows from this that acceptance of a plea offer is a critical stage. That, and nothing more, is the point of the Court's observation in *Padilla v. Kentucky*, 559 U. S. \_\_\_\_ (2010) (slip op., at 16), that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." The defendant in *Padilla* had accepted the plea bargain and pleaded guilty, abandoning his right to a fair trial; he was entitled to advice of competent counsel before he did so. The Court has never held that the rule articulated in *Padilla*, *Tovar*, and *Hill* extends to all aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the defendant rejects a plea bargain and stands on his constitutional right to a fair trial. The latter is a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining.

It is also apparent from *Strickland* that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense. *Strickland* explained that "[i]n giving meaning to the requirement [of effective assistance], . . . we must take its purpose--to ensure a fair trial--as the guide." 466 U. S., at 686. Since "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," *United States v. Cronin*, 466 U. S. 648, 658 (1984), the "benchmark" inquiry in evaluating any claim of ineffective assistance is whether counsel's performance "so undermined the proper functioning of the adversarial process" that it failed to produce a reliably "just result." *Strickland*, 466 U. S., at 686. That is what *Strickland*'s requirement of "prejudice" consists of: Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel's mistakes call into question the basic justice of a defendant's conviction or sentence. That has been, until today, entirely clear. A defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687. See also *Gonzalez-Lopez*, supra, at 147. Impairment of fair trial is how we distinguish between unfortunate attorney error and error of constitutional significance.

To be sure, *Strickland* stated a rule of thumb for measuring prejudice which, applied blindly and out of context, could support the Court's holding today: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. *Strickland* itself cautioned, however, that its test was not to be applied in a mechanical fashion, and that courts were not to divert their "ultimate focus" from "the fundamental fairness of the proceeding whose result is being challenged." *Id.*, at 696. And until today we have followed that course.

In *Lockhart v. Fretwell*, 506 U. S. 364 (1993), the deficient performance at issue was the failure of counsel for a defendant who had been sentenced to death to make an objection that would have produced a sentence of life imprisonment instead. The objection was fully supported by then-extant Circuit law, so that the sentencing court would have been compelled to sustain it, producing a life sentence that principles of double jeopardy would likely make final. See *id.*, at 383-385 (Stevens, J., dissenting); *Bullington v. Missouri*, 451 U. S. 430 (1981). By the time *Fretwell*'s claim came before us, however, the Circuit law had been overruled in light of one of our cases. We determined that a prejudice analysis "focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable," would be defective. *Fretwell*, 506 U. S., at 369. Because counsel's error did not "deprive the defendant of any substantive or procedural right to which the law entitles him," the defendant's sentencing proceeding was fair and its result was reliable, even though counsel's error may have affected its outcome. *Id.*, at 372. In *Williams v. Taylor*, 529 U. S. 362, 391-393 (2000), we explained that even though *Fretwell* did not mechanically apply an outcome-based test for prejudice, its reasoning was perfectly consistent with *Strickland*. "*Fretwell*'s counsel had not deprived him of any substantive or procedural right to which the law entitles him." 529 U. S. at 392.<sup>2</sup>

Those precedents leave no doubt about the answer to the question presented here. As the Court itself observes, a criminal defendant has no right to a plea bargain. Ante, at 9. "[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." *Weatherford v. Bursey*, 429 U. S. 545, 561 (1977). Counsel's mistakes in this case thus did not "deprive the defendant of a substantive or procedural right to which the law entitles him," *Williams*, supra, at 393. Far from being "beside the point," ante, at 9, that is critical to correct application of our precedents. Like *Fretwell*, this case "concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry," 506 U. S., at 373 (O'Connor, J.,

concurring); he claims "that he might have been denied 'a right the law simply does not recognize,'" *id.*, at 375 (same). Strickland, Fretwell, and Williams all instruct that the pure outcome-based test on which the Court relies is an erroneous measure of cognizable prejudice. In ignoring Strickland's "ultimate focus . . . on the fundamental fairness of the proceeding whose result is being challenged," 466 U. S., at 696, the Court has lost the forest for the trees, leading it to accept what we have previously rejected, the "novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Weatherford*, *supra*, at 561.

## II

Novelty alone is the second, independent reason why the Court's decision is wrong. This case arises on federal habeas, and hence is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Since, as the Court acknowledges, the Michigan Court of Appeals adjudicated Cooper's ineffective-assistance claim on the merits, AEDPA bars federal courts from granting habeas relief unless that court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). Yet the Court concludes that §2254(d)(1) does not bar relief here, because "[b]y failing to apply Strickland to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." *Ante*, at 15. That is not so.

The relevant portion of the Michigan Court of Appeals decision reads as follows:

"To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable.

"Defendant challenges the trial court's finding after a Ginther hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for defendant." *People v. Cooper*, No. 250583 (Mar. 15, 2005), App. to Pet. for Cert. 45a, 2005 WL 599740, \*1 (per curiam) (footnote and citations omitted).

The first paragraph above, far from ignoring Strickland, recites its standard with a good deal more accuracy than the Court's opinion. The second paragraph, which is presumably an application of the standard recited in the first, says that "defendant knowingly and intelligently rejected two plea offers and chose to go to trial." This can be regarded as a denial that there was anything "fundamentally unfair" about Cooper's conviction and sentence, so that no Strickland prejudice had been shown. On the other hand, the entire second paragraph can be regarded as a contention that Cooper's claims of inadequate representation were unsupported by the record. The state court's analysis was admittedly not a model of clarity, but federal habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a license to penalize a state court for its opinion-writing technique. *Harrington v. Richter*, 562 U. S. \_\_\_, \_\_\_ (2011) (slip op., at 13) (internal quotation marks omitted). The Court's readiness to find error in the Michigan court's opinion is "inconsistent with the presumption that state courts know and follow the law," *Woodford v. Visciotti*, 537 U. S. 19, 24 (2002) (per curiam), a presumption borne out here by the state court's recitation of the correct legal standard.

Since it is ambiguous whether the state court's holding was based on a lack of prejudice or rather the court's factual determination that there had been no deficient performance, to provide relief under AEDPA this Court must conclude that both holdings would have been unreasonable applications of clearly

established law. See *Premo v. Moore*, 562 U. S. \_\_\_, \_\_\_ (2011) (slip op., at 7). The first is impossible of doing, since this Court has never held that a defendant in Cooper's position can establish Strickland prejudice. The Sixth Circuit thus violated AEDPA in granting habeas relief, and the Court now does the same.

### III

It is impossible to conclude discussion of today's extraordinary opinion without commenting upon the remedy it provides for the unconstitutional conviction. It is a remedy unheard-of in American jurisprudence--and, I would be willing to bet, in the jurisprudence of any other country.

The Court requires Michigan to "reoffer the plea agreement" that was rejected because of bad advice from counsel. *Ante*, at 16. That would indeed be a powerful remedy--but for the fact that Cooper's acceptance of that re-offered agreement is not conclusive. Astoundingly, "the state trial court can then exercise its discretion in determining whether to vacate the convictions and sentence respondent pursuant to the plea agreement, to vacate only some of the convictions and sentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed." *Ibid.* (emphasis added).

Why, one might ask, require a "reoffer" of the plea agreement, and its acceptance by the defendant? If the district court finds (as a necessary element, supposedly, of Strickland prejudice) that Cooper would have accepted the original offer, and would thereby have avoided trial and conviction, why not skip the reoffer-and-reacceptance minuet and simply leave it to the discretion of the state trial court what the remedy shall be? The answer, of course, is camouflage. Trial courts, after all, regularly accept or reject plea agreements, so there seems to be nothing extraordinary about their accepting or rejecting the new one mandated by today's decision. But the acceptance or rejection of a plea agreement that has no status whatever under the United States Constitution is worlds apart from what this is: "discretionary" specification of a remedy for an unconstitutional criminal conviction.

To be sure, the Court asserts that there are "factors" which bear upon (and presumably limit) exercise of this discretion--factors that it is not prepared to specify in full, much less assign some determinative weight. "Principles elaborated over time in decisions of state and federal courts, and in statutes and rules" will (in the Court's rosy view) sort all that out. *Ante*, at 13. I find it extraordinary that "statutes and rules" can specify the remedy for a criminal defendant's unconstitutional conviction. Or that the remedy for an unconstitutional conviction should ever be subject at all to a trial judge's discretion. Or, finally, that the remedy could ever include no remedy at all.

I suspect that the Court's squeamishness in fashioning a remedy, and the incoherence of what it comes up with, is attributable to its realization, deep down, that there is no real constitutional violation here anyway. The defendant has been fairly tried, lawfully convicted, and properly sentenced, and any "remedy" provided for this will do nothing but undo the just results of a fair adversarial process.

### IV

In many--perhaps most--countries of the world, American-style plea bargaining is forbidden in cases as serious as this one, even for the purpose of obtaining testimony that enables conviction of a greater malefactor, much less for the purpose of sparing the expense of trial. See, e.g., *World Plea Bargaining* 344, 363-366 (S. Thaman ed. 2010). In Europe, many countries adhere to what they aptly call the "legality principle" by requiring prosecutors to charge all prosecutable offenses, which is typically incompatible with the practice of charge-bargaining. See, e.g., *id.*, at xxii; Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 Mich. L. Rev. 204, 210-211 (1979) (describing the "Legalitätsprinzip," or rule of compulsory prosecution, in Germany). Such a system reflects an admirable belief that the law is the law, and those who break it should pay the penalty provided.

In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often--perhaps usually--results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt. See, e.g., *Alschuler, Plea Bargaining and its History*, 79 Colum. L. Rev. 1, 38 (1979).

Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, "it is the criminal justice system." *Frye*, *ante*, at 7 (quoting approvingly from *Scott* 1912). Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the

exorbitant gold standard of American justice--a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States;) the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his constitutional entitlement to plea-bargain.

I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.

\* \* \*

Today's decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of constitutional jurisprudence ("plea-bargaining law") without even specifying the remedies the boutique offers. The result in the present case is the undoing of an adjudicatory process that worked exactly as it is supposed to. Released felon Anthony Cooper, who shot repeatedly and gravely injured a woman named Kali Mundy, was tried and convicted for his crimes by a jury of his peers, and given a punishment that Michigan's elected representatives have deemed appropriate. Nothing about that result is unfair or unconstitutional. To the contrary, it is wonderfully just, and infinitely superior to the trial-by-bargain that today's opinion affords constitutional status. I respectfully dissent.

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Alito, J., dissenting 566 U. S. \_\_\_\_ (2012) LAFLER v. COOPER SUPREME COURT OF THE UNITED STATES No. 10-209

BLAINE LAFLER, PETITIONER v. ANTHONY COOPER

on writ of certiorari to the united states court of appeals for the sixth circuit

[March 21, 2012]

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Justice Alito, dissenting.

For the reasons set out in Parts I and II of Justice Scalia's dissent, the Court's holding in this case misapplies our ineffective-assistance-of-counsel case law and violates the requirements of the Antiterrorism and Effective Death Penalty Act of 1996. Respondent received a trial that was free of any identified constitutional error, and, as a result, there is no basis for concluding that respondent suffered prejudice and certainly not for granting habeas relief.

The weakness in the Court's analysis is highlighted by its opaque discussion of the remedy that is appropriate when a plea offer is rejected due to defective legal representation. If a defendant's Sixth Amendment rights are violated when deficient legal advice about a favorable plea offer causes the opportunity for that bargain to be lost, the only logical remedy is to give the defendant the benefit of the favorable deal. But such a remedy would cause serious injustice in many instances, as I believe the Court tacitly recognizes. The Court therefore eschews the only logical remedy and relies on the lower courts to exercise sound discretion in determining what is to be done.

Time will tell how this works out. The Court, for its part, finds it unnecessary to define "the boundaries of proper discretion" in today's opinion. Ante, at 13. In my view, requiring the prosecution to renew an old plea offer would represent an abuse of discretion in at least two circumstances: first, when important new information about a defendant's culpability comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources.

The lower court judges who must implement today's holding may--and I hope, will--do so in a way that mitigates its potential to produce unjust results. But I would not depend on these judges to come to the rescue. The Court's interpretation of the Sixth Amendment right to counsel is unsound, and I therefore respectfully dissent.

---

## FOOTNOTES

### Footnote 1

Rather than addressing the constitutional origins of the right to effective counsel, the Court responds to the broader claim (raised by no one) that "the sole purpose of the Sixth Amendment is to protect the right to a fair trial." Ante, at 6 (emphasis added). Cf. Brief for United States as Amicus Curiae 10-12 (arguing that the "purpose of the Sixth Amendment right to counsel is to secure a fair trial" (emphasis added)); Brief for Petitioner 12-21 (same). To destroy that straw man, the Court cites cases in which violations of

rights other than the right to effective counsel--and, perplexingly, even rights found outside the Sixth Amendment and the Constitution entirely--were not cured by a subsequent trial. *Vasquez v. Hillery*, 474 U. S. 254 (1986) (violation of equal protection in grand jury selection); *Ballard v. United States*, 329 U. S. 187 (1946) (violation of statutory scheme providing that women serve on juries); *Stirone v. United States*, 361 U. S. 212 (1960) (violation of Fifth Amendment right to indictment by grand jury). Unlike the right to effective counsel, no showing of prejudice is required to make violations of the rights at issue in *Vasquez*, *Ballard*, and *Stirone* complete. See *Vasquez*, supra, at 263-264 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review"); *Ballard*, supra, at 195 ("[R]eversible error does not depend on a showing of prejudice in an individual case"); *Stirone*, supra, at 217 ("Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"). Those cases are thus irrelevant to the question presented here, which is whether a defendant can establish prejudice under *Strickland v. Washington*, 466 U. S. 668 (1984), while conceding the fairness of his conviction, sentence, and appeal.

#### Footnote 2

*Kimmelman v. Morrison*, 477 U. S. 365 (1986), cited by the Court, ante, at 10-11, does not contradict this principle. That case, which predated *Fretwell and Williams*, considered whether our holding that Fourth Amendment claims fully litigated in state court cannot be raised in federal habeas "should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment." 477 U. S., at 368. Our negative answer to that question had nothing to do with the issue here. The parties in *Kimmelman* had not raised the question "whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*"--a question similar to the one presented here--and the Court therefore did not address it. *Id.*, at 391 (Powell, J., concurring in judgment); see also *id.*, at 380. *Kimmelman* made clear, however, how the answer to that question is to be determined: "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect," *id.*, at 374 (emphasis added). "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial . . . will be granted the writ," *id.*, at 382 (emphasis added). In short, *Kimmelman's* only relevance is to prove the Court's opinion wrong.

#### Footnote 3

See *People v. Cooks*, 446 Mich. 503, 510, 521 N. W. 2d 275, 278 (1994); 6 W. LaFare, J. Israel, N. King, & O. Kerr, *Criminal Procedure* §22.1(e) (3d ed. 2007 and Supp. 2011-2012).

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# **DISCOVERY PANEL DISCUSSION**

**PRESENTED BY**

**ANDY KAHL, ASST. U.S. ATTORNEY  
TIM ROSS-BOON, JANE KELLY,  
ASST. FEDERAL PUBLIC DEFENDERS  
ANGELA CAMPBELL,  
CJA PANEL ATTORNEY**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**vs.**

[REDACTED]

**Defendant.**

**Case No. [REDACTED]**

**STIPULATED DISCOVERY ORDER**

At the time of arraignment or initial appearance the following discovery obligations have been agreed to by the parties and the Court so **ORDERS** such compliance.

1. The United States will include in its expanded discovery file or otherwise make available law enforcement reports (excluding evaluative material of matters such as possible defenses and legal strategies), grand jury testimony and evidence or existing summaries of evidence in the custody of the United States Attorney's Office which provide the basis for the case against the defendant. The file will include Rule 16, *Brady*, and Jencks Act materials of which the United States Attorney's Office is aware and possesses. Should the defendant become aware of any *Brady* material not contained in the expanded discovery file, defendant will notify the United States Attorney's Office of such materials in order that the information may be obtained.

2. The United States may redact or withhold information from the expanded discovery file for security concerns or to protect an ongoing investigation. This does not preclude the defendant from requesting in camera review of such material by the court, upon proper showing, in order to determine whether or not it should be disclosed in accordance with Fed. R. Crim. P. 16. Where the United States withholds information from the expanded discovery file, notice of the withholding along with a general

description of the type of material withheld will be included in the expanded discovery file. The expanded discovery file will also not contain evidence which the United States has decided to use for impeachment of defense witnesses or rebuttal evidence. It will not include evaluative material of matters such as possible defenses and legal strategies or other attorney work product. The United States is authorized to disclose any defendant's tax information in its file to co-defendants for use consistent with this Order.

3. The information in the United States' discovery file may only be used for the limited purpose of discovery and in connection with the above-captioned federal criminal case now pending against the defendant. The information provided in discovery shall not be disclosed to or used by any person other than that defendant and his or her counsel, and may not be used or disclosed in any proceeding not part of the pending criminal case. This paragraph does not prohibit the sharing of information by co-defendants in this federal criminal case between or among counsel who are subject to this Order. No information obtained through discovery shall be shared with other defendants or their counsel who are not subject to this Order except through motion pleading or the offer of trial and sentencing exhibits.

4. Grand jury testimony, Jencks Act statements and any transcription, summary, notes or dictation of discovery material will remain in the sole custody of the party's attorney or the agent working on behalf of the attorney and shall not be left with the defendant. The prohibition on leaving materials with the defendant shall not apply to items discoverable under Fed. R. Crim. P. 16, specifically, the defendant's statements, the defendant's criminal record, and to the extent they are intended for use by the government as evidence in chief at trial, copies of documents, tangible objects, and reports of examinations and tests. The defense shall not photocopy or reproduce grand jury transcripts, Jencks Act statements or exhibits. If the attorney for the defendant is subsequently allowed to withdraw from this case, and a new attorney is appointed or retained, upon agreement by the United States Attorney's Office, the withdrawing attorney

may provide copies of transcriptions, summaries, notes or dictations of discovery material to the new attorney. The new attorney, however, shall be subject to the terms of this order.

5. Any summary, notes, transcripts or dictation of discovery material, including copies thereof, and copies of all discovery material, must be returned to the parties or certified as destroyed at the conclusion of the trial, sentencing or appeal, whichever is later.

6. Upon disclosure of the United States' discovery file, defendant shall immediately provide and shall be under a continuing obligation to provide disclosure of statements as defined in 18 U.S.C. § 3500(e)(1) & (2) and reciprocal discovery under Fed. R. Crim. P. 16(b) and 26.2.

7. Dictation of discovery materials is permissible, but duplication of materials by video, photography, copy machine, or computer scanner or other means may not be used unless the party providing the discovery specifically agrees to such method.

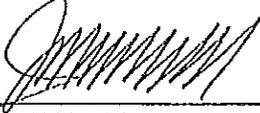
8. The United States' expanded discovery file generally satisfies its notice obligations pursuant to Fed. R. Crim. P. 12(b)(4) and Fed. R. Evid. 404(b) and 609(b). If the defendant identifies specific evidence in the expanded discovery file, however, and asks the United States whether it intends to introduce such evidence pursuant to Fed. R. Crim. P. 12(b)(4) or Fed. R. Evid. 404(b) and 609(b), the United States will specify whether it intends to use such evidence and if offered pursuant to Fed. R. Evid. 404(b), will identify the purpose for which it will be offered under the rule without further motion or order.

9. The parties will exchange a list of prospective witnesses and a list of prospective exhibits no later than five working days prior to trial. For witnesses for whom there existed no statements or reports that were subject to disclosure through discovery, the party listing the witness shall also note next to the witness's name on the list the general purpose of his or her expected testimony.

10. This ORDER imposes a continuing duty to disclose on all parties.

IT IS SO ORDERED.

DATED this [REDACTED]

  
\_\_\_\_\_  
JON STUART SCOLES  
UNITED STATES MAGISTRATE JUDGE  
NORTHERN DISTRICT OF IOWA

**PLEASE REFER TO MATERIALS IN:**

**FAST TRACK  
AND  
OTHER PLEA AGREEMENT ISSUES**

# **SENTENCING VIDEOS**

**PRESENTED BY**

**JOE HERROLD**  
**ASST. FEDERAL PUBLIC DEFENDER**

## SENTENCING VIDEOS

### **USA v. Gaston** (South Carolina)

Time: 7:46

Charge: Possession of Oxycontin with Intent to Distribute

Advisory Sentencing Guideline Range: 37-46 months of imprisonment

Main Argument: Character / Good Works.

Outcome: Probation

Attorney: Allen Burnside, Assistant Federal Public Defender, District of South Carolina

### **USA v. Smith** (Mississippi)

Time: 5:13

Charge: Threat to Government Official

Advisory Sentencing Guideline Range: 0-6 months of imprisonment

Main Argument: Character / Good Works in Community

Outcome: Probation

Attorney: Kevin Payne, Assistant Federal Public Defender, Northern District of Mississippi

**USA v. Maya-Hernandez (Arizona)**

Time: 7:59

Charge: Illegal Reentry

Advisory Sentencing Guideline Range: 46-57 months of imprisonment

Main Argument: Need to Support Sick Child

Outcome: 30 months of imprisonment

Attorney: Lee Titterington, Assistant Federal Public Defender, District of Arizona

**USA v. Applequist (Alaska)**

Time: 4:27

Charge: Possession of Child Pornography

Advisory Sentencing Guideline Range: 70-87 months of imprisonment

Main Argument: Physical Condition

Outcome: Probation

Attorney: Michael Dieni, Assistant Federal Public Defender, District of Alaska

**USA v. Harrison**

Time: 14:49

Charge: Felon in Possession of a Firearm

Advisory Sentencing Guideline Range: 63-78 months of imprisonment

Main Argument: Post Offense Rehabilitation

Outcome: Probation

Attorney: Syovata Edari, Assistant Federal Public Defender, District of Kansas

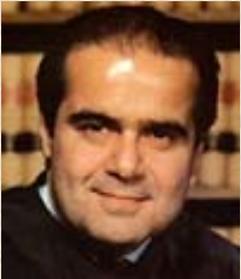
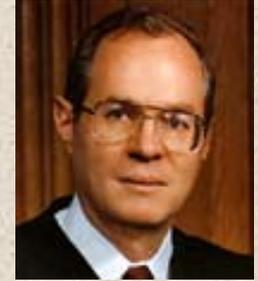
**SUPREME COURT  
&  
EIGHTH CIRCUIT UPDATE**

**PRESENTED BY**

**JOHN MESSINA  
RESEARCH & WRITING ATTORNEY**



# U.S. Supreme Court Justices



# Search and Seizure - - Jail Strip Searches

***Florence v. Board of Chosen  
Freeholders,***  
132 S.Ct. 1510 (2012)

**Court upholds strip search policy  
for all detainees admitted to a  
general jail population**



“The difficulties of operating a detention center must not be underestimated by the courts.”



“This case does not require the court to rule on . . . where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees. . . . There also may be legitimate concerns about the invasiveness of searches that involve the touching of detainees. These issues are not implicated on the facts of this case. . . .”

# Search and Seizure - - Use of GPS Tracking Device

*United States v. Jones*,  
132 S.Ct. 945 (2012)

**Attachment of GPS device to vehicle and subsequent use of the device to track the vehicle's movements was a search within the meaning of the Fourth Amendment**



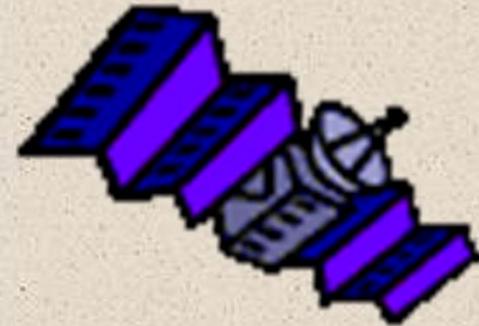
“In *Katz*, this Court enlarged its then-prevailing focus on property rights by announcing that the reach of the Fourth Amendment does not ‘turn upon the presence or absence of a physical intrusion.’ . . . [H]owever, *Katz*’s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it. . . . [T]he trespassory test . . . reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs.”

- Sotomayor, J., concurring with the four other justices finding an investigatory trespass on a protected area sufficient alone to establish a Fourth Amendment search.

# Search and Seizure - - Expectations of Privacy - - Rethinking Privacy Protections in the Digital Age

*United States v. Jones*,  
132 S.Ct. 945 (2012)

**Justice Sotomayor suggests that  
the law's privacy expectations may  
need to expand to adjust to the  
realities of the digital age**



“More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g.*, *Smith*, 442 U.S. at 742; *United States v. Miller*, 425 U.S. 435, 443 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. . . . But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.”

- Sotomayor, J., concurring

# Search and Seizure - - Exigency to Enter Home

*Ryburn v. Huff,*

132 S.Ct. 987 (2012)

**Officers responding to school shooting threat acted reasonably in entering home when uncooperative parent turned and ran into her house when asked if there were any guns inside**

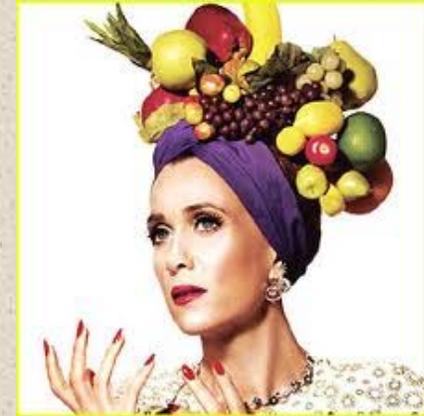


“[T]he [9<sup>th</sup> Circuit] panel majority appears to have taken the view that conduct cannot be regarded as a matter of concern so long as it is lawful. . . . It should go without saying, however, that there are many circumstances in which lawful conduct may portend imminent violence.”

# Miranda - - Prison Interrogation

***Howes v. Fields,***  
132 S.Ct. 1181 (2012)

**Prisoner brought to conference room for questioning was not *ipso facto* in “custody” for Miranda purposes**



“As used in our *Miranda* case law, ‘custody’ is a term of art. . . . Not all restraints on freedom of movement amount to custody for purposes of *Miranda*.”

•

“[I]mprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*.”

•

“Most important, respondent was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted.”

# Sixth Amendment - - Effective Assistance of Counsel - - Failure to Convey Formal Plea Offer

*Missouri v. Frye,*  
132 S.Ct. 1399 (2012)

**Counsel had duty to inform defendant of formal plea bargain offer by prosecution; prejudice requires a reasonable probability that defendant would have accepted plea offer and that prosecution would not have withdrawn it and that trial court would have accepted it**



“This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.”

# Sixth Amendment - - Effective Assistance of Counsel - - Misadvice that Causes Rejection of Plea Offer

*Lafler v. Cooper*,  
132 S.Ct. 1376 (2012)

**Fairness of ensuing trial and guilty verdict doesn't cure ineffective assistance that causes favorable plea offer to be rejected**



“In the end, [the state’s] three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”

# Due Process - - Judicial Screening of Eyewitness Identification Evidence

***Perry v. New Hampshire***,  
132 S.Ct. 716 (2012)

**Due process challenge to admissibility of eyewitness identification evidence only applies where law enforcement arranged the identification procedure**



“The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. . . . A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.”

•

“Our unwillingness to enlarge the domain of due process as *Perry* and the dissent urge rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence.”

# ***Brady* - - Eyewitness Impeachment**

***Smith v. Cain,***

132 S.Ct. 627 (2012)

**Court tosses Louisiana murder conviction for failure to disclose key eyewitness's statement to lead investigator that he couldn't identify any of the assailants in a robbery/murder**



“[E]vidence impeaching an eyewitness may not be material if the State’s other evidence is strong enough to sustain confidence in the verdict. That is not the case here. Boatner’s testimony was the *only* evidence linking Smith to the crime. And Boatner’s undisclosed statements directly contradict his testimony. . . .”

# Sentencing - - Authority of Federal Court to Run Federal Sentence Consecutive to or Concurrent with Yet-To-Be Imposed State Sentence

*Stetser v. United States*,  
\_\_\_ S.Ct. \_\_\_ (2012)

**Federal courts have inherent authority to order federal sentences to run consecutively or concurrently with anticipated state sentence**



“Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.”

# Collateral Review - - 28 U.S.C. § 2254 - - Cause to Excuse Procedural Default - - Lack of Counsel or Ineffective Assistance of Counsel at Initial Postconviction Proceeding

*Martinez v. Ryan*,  
132 S.Ct. 1309 (2012)

**Procedural default of ineffective assistance of trial counsel claim did not preclude federal habeas review where state requires that such claims be first raised in postconviction proceedings and postconviction counsel was arguably ineffective for failing to assert the ineffective assistance of trial counsel claim**



“[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*. . . .”

# Collateral Review - - 28 U.S.C. § 2254 - - Cause Excusing Procedural Default - - Abandonment by Counsel

*Maples v. Thomas*,  
132 S.Ct. 912 (2012)

**Counsel's abandonment of capital  
defendant's postconviction case  
without notice constituted cause for  
excusing defendant's failure to  
timely appeal state postconviction  
ruling**

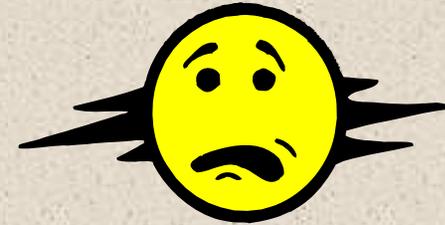


“Negligence on the part of a prisoner’s postconviction attorney does not qualify as ‘cause.’ . . . Thus, when a petitioner’s postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. . . . A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default.”

# Collateral Review - - Confrontation - - Habeas Review of Unavailability Determination

*Hardy v. Cross*,  
132 S.Ct. 490 (2011)

**Seventh Circuit erred in second-guessing state court's unavailability determination in Confrontation Clause case**



**SORRY WE  
MISSED YOU!**

“[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness’ presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising. And, more to the point, the deferential standard of review set out in 28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court’s decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken.” (citation omitted).

•

“We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes.”

# Collateral Review - - 28 U.S.C. § 2244 (d)(1)(A) - - One-Year Deadline for Filing Petition for Habeas Corpus Review of State Conviction - - Failure to Seek Discretionary (Further) Review in State Court

*Gonzalez v. Thaler*,  
132 S.Ct. 641 (2012)

**For defendant who fails to seek discretionary (further) review from state's highest court, one-year habeas deadline runs from the expiration of the date for seeking such review**



“For petitioners who pursue direct review all the way to this Court, the judgment becomes final at the ‘conclusion of direct review’ –when this Court affirms a conviction on the merits or denies a petition for certiorari. For all other petitioners, the judgment becomes final at the ‘expiration of the time for seeking such review’ –when the time for pursuing direct review in this Court, or in state court, expires. . . . [B]ecause Gonzalez did not appeal to the State’s highest court, his judgment became final when his time for seeking review with the State’s highest court expired.”

\*This abrogates the Eighth Circuit’s decision in *Riddle v. Kemna*, 523 F.3d 850 (8<sup>th</sup> Cir. 2008) (en banc), which held that issuance of the state court’s mandate marked the conclusion of direct review for a defendant who did not seek further review by the state’s highest court. *King v. Hobbs*, 666 F.3d 1132, 1135 n.2 (8<sup>th</sup> Cir. 2012).

# Applying the One-Year Deadline for State Prisoners Seeking Federal Habeas Corpus Relief

For most state prisoners, there is a one-year deadline for filing for federal habeas corpus relief. 28 U.S.C. § 2244(d)(1). There are narrow exceptions for situations where the state impeded the filing, or the Supreme Court made a newly recognized right retroactively applicable, or the factual basis for the claim could not have been timely discovered. 28 U.S.C. § 2244(d)(1)(B) – (D). In most instances, however, a state prisoner has one year to file for federal habeas corpus relief, and that year runs from “the conclusion of direct review or the expiration of the time for seeking such review[.]” 28 U.S.C. § 2244(d)(1)(A).

**In Iowa, if the defendant’s appeal is decided by the Iowa Court of Appeals and the defendant does not seek further review by the Iowa Supreme Court,** the one-year deadline starts when the time for seeking further review has expired. *Gonzalez v. Thaler*, 132 S.Ct. 641 (2012).

**If the Court of Appeals defendant does seek further review by the Iowa Supreme Court, and review is denied, and defendant does not seek a writ of certiorari from the U.S. Supreme Court,** the one-year habeas deadline starts 90 days after the Iowa Supreme Court order denying further review. *See Lawrence v. Florida*, 549 U.S. 327, 333, 127 S.Ct. 1079, 1083-84, 166 L.Ed2d 924 (2007); *Clay vs. United States*, 537 U.S. 522, 527-28, n.3, 123 S.Ct. 1072, 155 L.Ed 2d 88 (2003).

(A defendant who does not seek further review by the state’s highest court does not get the “time for seeking certiorari” included in the direct review calculus because failure to seek review by the state’s highest court precludes review by the U.S. Supreme Court. *Gonzalez v. Thaler*, 132 S.Ct. 641, 656(2012); S.Ct. Rule 13.1)

**If defendant's case is decided by the Iowa Supreme Court**, the one-year habeas deadline starts 90 days after the decision, unless defendant actually files a timely petition for writ of certiorari. In that case, the one-year habeas deadline starts when the writ of certiorari is denied or the U.S. Supreme Court grants certiorari and affirms the conviction. *Gonzalez v. Thaler*, 132 S.Ct. 641 (2012).

**Rule of Thumb for Iowa Defendants:**

If the last word on the appeal is by the Iowa Court of Appeals, the one-year habeas clock starts when the deadline for seeking further review expires.

If the last word on the appeal is by the Iowa Supreme Court (ruling on the merits or denial of further review), add 90 days then start the habeas clock.

**Tolling**

Remember, the one-year habeas clock is tolled during the time that a properly filed postconviction petition is pending. 28 U.S.C. § 2244(d)(2); see also *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (holding that the tolling period does not include the time for seeking a writ of certiorari from the denial of postconviction relief); *Carey v. Saffold*, 536 U.S. 214, 219-20, 122 S.Ct. 2134, 2138-39, 153 L.3d 2d 260 (2002) (holding that a state postconviction case remains pending (tolled) during the period that the defendant seeks state appellate review of the decision).

# One Year Habeas Deadline

## Iowa Court of Appeals Defendants

<i>Defendant Loses</i>		<i>Defendant Seeks Further Review</i>
Start clock when further review period expires		Take the date further review is denied, add the 90-day cert. period, then start the one-year habeas clock *

---

## Iowa Supreme Court Defendants

Take the date the Iowa Supreme Court issues its decision, add the 90-day cert. period, then start the one-year habeas clock \*

\* If defendant actually files a timely petition for a writ of certiorari, the one-year deadline starts to run when the petition is denied.

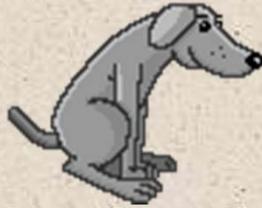
# Stuff to Come

## Search and Seizure - - Dog Sniff at Front Door

### ***Florida v. Jardines***

S.Ct. No. 11-564 (cert. granted 1/6/12). Decision below reported at 73 So.3d 34 (Fla. 2011).

Cert. granted to review Florida Supreme Court ruling that a dog sniff at the front door of a home is a search under the Fourth Amendment.



## Search and Seizure - - Dog Sniff at Vehicle - - Probable Cause

### ***Florida v. Harris***

S.Ct. No. 11-817 (cert. granted 3/26/12). Decision below reported at 71 So.3d 756 (Fla. 2011).

Does an alert by a trained and certified narcotics dog yield probable cause to search a motor vehicle? (Florida Supreme Court held that probable cause requires a detailed showing of the dog's reliability, apart from his mere certification as a narcotics dog).

# Stuff to come cont'd

## **Crimes - - Stolen Valor - - 18 U.S.C. § 704(b)**

### ***United States v. Xavier Alvarez***

S.Ct. No. 11-210 (cert. granted 10/17/11). Decision below reported at 617 F.3d 1198 (9<sup>th</sup> Cir. 2010).

Supreme Court will consider facial First Amendment (free speech) challenge to statute that proscribes false representations about having been awarded a medal for military service.

## **Confrontation - - Expert Testimony on DNA Testing Results**

### ***Williams v. Illinois***

S.Ct. No. 10-8505 (cert. granted 6/28/11). Decision below reported at 238 Ill.2d 125 (Ill. 2010).

Is the Confrontation Clause violated by a state rule of evidence that allows an expert witness to testify about the results of DNA testing performed by non-testifying analysts?

# Stuff to come cont'd

## Double Jeopardy - - Retrial of Greater Offense After First Jury Rejects the Greater But Deadlocks on the Lesser

### ***Blueford v. Arkansas***

S.Ct. No. 10-1320 (cert. granted 10/11/11). Decision below reported at 2011 Ark.8, \_\_\_\_ S.W.3d \_\_\_\_ (Ark. 2011).

Defendant's jury voted unanimously against murder charges, but deadlocked on lesser included manslaughter charge. Cert. granted to consider whether mistrial due to deadlock allows state to re prosecute on all charges.

## Eighth Amendment - - Cruel and Unusual Punishment - - Life Without Parole for Youthful Juveniles Guilty of Homicide

### ***Miller v. Alabama; Jackson v. Hobbs***

S.Ct. Nos. 10-9646 & 10-9647 (cert. granted 11/7/11). Decision below reported at 63 So.3d 676 (Ala. 2011) & 2011 Ark. 49 (2011).

Does the Eighth Amendment bar a life without parole sentence for a 14-year-old who commits homicide? (Miller actually committed a killing; Jackson aided a robbery that resulted in a murder committed by his accomplice).

# Stuff to come cont'd

## Apprendi - - Accumulating Fines Determination

### ***Southern Union Co. v. United States***

S.Ct. No. 11-94 (cert. granted 11/28/11). Decision below reported at 630 F3d 17 (1<sup>st</sup> Cir. 2010).

Storage violation under 42 U.S.C. § 6928(d) permits a \$50,000 fine “for each day of violation.” Does *Apprendi* entitle defendant to a jury determination on the duration of the violation, or can the court at sentencing make that finding and levy the fine accordingly?

## Fair Sentencing Act - - Defendants Who Committed Offense Before Passage of FSA, But Were Sentenced After Enactment

### ***Hill v. United States; Dorsey v. United States***

S.Ct. Nos. 11-5721 & 11-5683 (cert. granted 11/28/11). Decision below reported at 417 Fed.Appx. 560 & 635 F.3d 336 (7<sup>th</sup> Cir. 2011).

Cert. granted to resolve circuit split on whether the Fair Sentencing Act applies to all defendants sentenced after enactment. (The Eighth Circuit does not apply the FSA to any defendant who committed the crack offense prior to FSA enactment - - *United States v. Sidney*, 648 F.3d 904 (8<sup>th</sup> Cir. 2011)).

# Stuff to come cont'd

## Collateral Review - - Waiver of Statute of Limitations Defense

### ***Wood v. Milyard***

S.Ct. No. 10-9995 (cert. granted 9/27/11). Decision below reported at \_\_\_\_\_.

May an appellate court sua sponte raise a statute of limitations defense to a habeas petition, or does a state's concession that it does not challenge the timeliness of the petition constitute a waiver of the limitations defense?

# Eighth Circuit Case Update



# Eighth Circuit Judges

## Active Judges

Hon. William Jay Riley, Chief  
Hon. Roger L. Wollman  
Hon. James B. Loken  
Hon. Diana Murphy  
Hon. Kermit E. Bye  
Hon. Michael J. Melloy  
Hon. Lavenski R. Smith  
Hon. Steven M. Colloton  
Hon. Raymond W. Gruender  
Hon. Duane Benton  
Hon. Bobby Shepherd

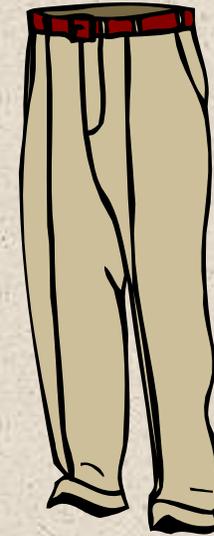
## Senior Judges

Hon. Myron H. Bright  
Hon. Pasco M. Bowman  
Hon. C. Arlen Beam  
Hon. David R. Hansen  
Hon. Morris Arnold

# Search and Seizure - - Observation of Concealed Bulge During Consensual Encounter

***United States v. Aquino,***  
674 F.3d 918 (8<sup>th</sup> Cir. 2012)

**Drug interdiction encounter at Greyhound Bus Depot crossed the line when officer lifted defendant's pant leg upon seeing a bulge there**



“Lutter violated the Fourth Amendment when he searched underneath an article of Aquino’s clothing without his consent and without probable cause to do so, instead of performing a pat down to confirm whether the concealed bulge was a weapon.”



“None of our prior cases have concluded the mere observation of a concealed bulge, standing alone, establishes probable cause to support an arrest.”



“An actual search of a person’s body is not authorized under *Terry* until *after* a pat down confirms the presence of a weapon or contraband.”

# Search and Seizure - - Expectations of Privacy - - Use of Key Fob to Identify Car

***United States v. Cowan,***  
674 F.3d 947 (8<sup>th</sup> Cir. 2012)

**Detective did not conduct a search  
by pressing alarm button on fob of  
lawfully seized keys in an effort to  
locate defendant's car**



“Cowan did not have a reasonable expectation of privacy in the identity of his car.”

•

“Pressing the alarm button on the key fob was a way to identify the car and did not tell officers anything about the fob's code or the car's contents.”

# Search and Seizure - - Standing

***United States v. Ruiz-Zarate,***  
\_\_\_ F.3d \_\_\_ (8<sup>th</sup> Cir. 2012)

**Mere fact that stop of vehicle ultimately led to defendant's arrest was insufficient to convey standing where defendant was not present and had no ownership interest in vehicle at time of stop**



“ . . . Ruiz-Zarate had no reasonable expectation of privacy in Morales's vehicle, which he neither owned nor was near at the time of the stop. Consequently, Ruiz-Zarate cannot raise a Fourth Amendment claim.”

# Search and Seizure - - Failed Knock and Talk - - Exigent Circumstances

***United States v. Ramirez,***  
\_\_\_ F.3d \_\_\_ (8<sup>th</sup> Cir. 2012)  
(2-1 vote)

**Circuit slams door on forced entry  
after failed attempt to knock and  
talk**



“[O]fficers certainly have the option at all times to merely knock on a door and seek entry. . . . However, when the police knock on a door but the occupants choose not to respond or speak, or maybe even choose to open the door then close it, or when no one does anything incriminating, the officers must bear the consequences of the method of investigation they’ve chosen.”

# Search and Seizure - - Trash Search

***United States v. Williams,***  
669 F.3d 903 (8<sup>th</sup> Cir. 2012)

**Seizure and search of trash left at  
curb for pick up did not violate the  
Fourth Amendment**



“The constitutionality of a trash pull depends upon ‘whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable.’”

•

“It is well settled that there is no reasonable expectation of privacy in trash left at the curb in an area accessible to the public for pick-up by a trash company.”

# Search and Seizure - - Wiretap Statute - - Authorization Requirement - - 18 U.S.C. § 2518(1)(a)

*United States v. Lomeli;*  
*United States v. Hernandez,*  
670 F.3d 616 (8<sup>th</sup> Cir. 2012)

**Statutory requirement that wiretap application identify the DOJ officer who authorized the application was not satisfied by boilerplate application merely stating that “an appropriate official of the Criminal Division” authorized the application**



“[T]he government failed to comply with the core statutory requirements of federal wiretap law and . . . the omission here was not merely a technical defect. . . .”

# Miranda - - Interrogation - - Routine Identification Questioning

***United States v. Cowan,***  
674 F.3d 947 (8<sup>th</sup> Cir. 2012)

**Routine basic identification inquiry during execution of search warrant was not interrogation for Miranda purposes, but follow-up question about car keys violated Miranda**



“Detective Canas’ question asking Cowan how he arrived at the apartment was not an interrogation because it was a ‘request for routine information necessary for basic identification purposes.’ Detective Canas was trying to understand and identify Cowan’s presence in the apartment. Cowan’s answer—that he arrived by bus from Chicago—was not obtained in violation of Miranda. However, this answer gave Detective Canas information that made Detective Canas’ next question—why Cowan had car keys if he arrived by bus—exceed a routine, basic identification inquiry and become an interrogation.” (citation omitted).

# Crimes - - Filing False Liens or Encumbrances Against Federal Judges and Others - - 18 U.S.C. § 1521 - - Sufficiency of Lien Instrument

From defendant's UCC filing:

***United States v. Reed;***  
***United States v. Davis,***  
668 F.3d 978 (8<sup>th</sup> Cir. 2012)  
668 F.3d 576 (8<sup>th</sup> Cir. 2012)

**Nonsensical lien was within the scope of statute proscribing “any false lien or encumbrance against the real or personal property” of certain federal actors**

This Financing Statement covers the following collateral:

Accepted for full value alleged court case #4-09-cr-00076-DLH (Reed's pending prosecution], **United States** District Court for the District of North Dakota; . . . Michael Howard Reed . . . Private Discharging and Indemnity Bond number 77915985385; Timothy Geithner, Secretary of the U.S. Treasury; [then listed as “acting agents” are the U.S. Attorney General; the Department of Justice; the North Dakota Governor and Attorney General; three criminal investigators; all District of North Dakota district and magistrate judges; the District Court Clerk; Jordheim and an Assistant U.S. Attorney; and an Assistant Federal Public Defender]; HACTC Detention Center . . . Rugby, North Dakota . . . Jurat Affidavit of Obligation, Affidavit and Affirmation of the Facts. This UCC lien in this instant action is \$2,400,100.00 USD for default of court case #4-09-cr-00076-DLH and \$1,000,000.00 (million) in sliver [sic] coinage for copyright violations of MICHAEL HOWARD REED TM [no doubt meaning trademark].

The adjustment of this filing is from Public Policy and UCC 1-104. All proceeds, products, accounts and fixtures including order(s) wherefrom are released to the debtor. . . . The Secured party stands by the Treaty of 1778, 1863, The Declaration of Princess Anne 1704 In regards to Mohegan Indians v. Connecticut, The Royal Proclamation of King George 1763, Declaratory Judgment < 28 USC 201>; Esens=Little Shell occupants of the land.

“No doubt the filing would not have succeeded in perfecting a priority claim to any property as a matter of commercial law. But that is not a defense. The prohibition in 18 U.S.C. § 1521 is triggered by the filing of a false or fictitious lien, whether or not it effectively impairs the government official's property rights and interests.”

# Crimes - - Possession of a Chemical Weapon - - 18 U.S.C. § 229(a)(1) - - Vagueness

*United States v. Ghane*,  
673 F.3d 771 (8<sup>th</sup> Cir. 2012)

**Circuit rejects claim that “peaceful purpose” exception to chemical weapons ban is impermissibly vague**



“[C]ommon understanding dictates that ‘peaceful purposes’ are those that are not intended to cause harm.”

•

“Even though the issue of whether use of a chemical weapon for suicide is a purpose exempted by the statute seems to make this a close case, the existence of a close case in the application of a statute does not render it unconstitutionally vague. . . . [A]ny reasonable jury is equipped to determine whether a particular set of facts suffices as an exempted use of a chemical weapon or not.”

# Crimes of Violence - - Mailing a Threatening Communication - - 18 U.S.C. § 876(c)

***United States v. Haileselassie***,  
668 F.3d 1033 (8<sup>th</sup> Cir. 2012)

**Circuit reaffirms its view that mailed threat to kidnap or injure another is a crime of violence, as the offense has an element of “threatened use of physical force” against another**



“As an element of § 876(c) is the threat to use force that in the ordinary case is violent physical force - - ‘injuring’ or ‘kidnapping’ - - *Leocal* and *Johnson* in no way ‘eroded’ *Left Hand Bull*.”

# Crimes - - Possession of a Firearm by an Illegal Alien - - 18 U.S.C. § 922(g)(5)(A) - - Second Amendment

***United States v. Flores***,  
663 F.3d 1022 (8<sup>th</sup> Cir. 2011)

**Circuit rejects *Heller* challenge to offense of being an illegal alien in possession of a firearm**



“Agreeing with the Fifth Circuit that the protections of the Second Amendment do not extend to aliens illegally present in this country, *United States v. Portillo-Munoz*, 643 F.437 (5<sup>th</sup> Cir. 2011) . . . we affirm.”

# Crimes - - Possession of a Firearm by Person Subject to a Restraining Order - - 18 U.S.C. § 922(g)(8) - - Second Amendment

***United States v. Bena***,  
664 F.3d 1180 (8<sup>th</sup> Cir. 2011)

**Circuit rejects *Heller* challenge to possession of firearm by person subject to domestic restraining order**



*“Heller* characterized the Second Amendment as guaranteeing ‘the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home.’”

•

“Under Iowa law . . . an order shall not issue unless magistrate finds that the ‘presence of or contact with the defendant poses a threat to the safety of the alleged victim’. . . . Bena brings only a facial challenge, and the state court in his case made a specific finding that he posed a threat to the safety of another. We thus need not consider whether §922(g)(8) would be constitutional as applied to a person who is subject to an order that was entered without evidence of dangerousness.”

# Crimes - - Attempted Enticement of a Minor - - 18 U.S.C. § 2422(b) - - Substantial Step

*United States v. Herbst*,  
666 F.3d 504 (8<sup>th</sup> Cir. 2012)

**Defendant's travel to meet minor was  
a substantial step toward  
commission of enticement offense**



“As we have previously held, the act of driving to a planned meeting location is sufficient to show that a defendant took a substantial step towards commission of the crime.”

# Crimes - - Attempted Enticement of a Minor - - 18 U.S.C. § 2422(b) - - Entrapment Defense

*United States v. Herbst*,  
666 F.3d 504 (8<sup>th</sup> Cir. 2012)

**Entrapment instruction not warranted  
where defendant shows a  
predisposition to commit the crime**



“Herbst conceded that he initiated sexual topics with “Brooke” and “Jenny,” that he suggested what sexual activities he wished to participate in with the personas, that he suggested meeting with the personas, and that he asked “Brooke” to call him to confirm plans to meet. . . . The evidence . . . clearly demonstrated that Herbst was predisposed to commit this crime, and thus the district court properly denied his request for an entrapment instruction.”

# Crimes - - Sex Trafficking of a Minor - - 18 U.S.C. § 1591 - - Knowledge Element

***United States v. Chappell,***  
665 F.3d 1012 (8<sup>th</sup> Cir. 2012)

**District court erred in instructing on amended knowledge element in case that predated the amendment**



“In 2007, § 1591 prohibited . . . enticing or recruiting a person to engage in commercial sex act, ‘*knowing* . . . the person has not attained the age of 18 years.’ 18 U.S.C. § 1591(a)(2006)(emphasis added). Congress amended § 1591 in 2008 to prohibit such conduct ‘*knowing, or in reckless disregard of the fact . . . that the person has not attained the age of 18 years.*’”

# Crimes - - Carjacking - - 18 U.S.C. § 2119 - - “From the Person or Presence of Another”

***United States v. Casteel,***  
663 F.3d 1013 (8<sup>th</sup> Cir. 2011)

**Theft of victim’s car in driveway was from her “person or presence,” as victim had been forcibly detained in chair in her home during home invasion, robbery and defendant’s flight from the scene**



“[E]very circuit court to consider this issue has determined the presence requirement of the carjacking statute may be satisfied when the victim of the carjacking is inside a building and the stolen car is parked outside.”



“We hold a motor vehicle is in a person’s presence for purposes of § 2119 ‘if it is so within his [or her] reach, inspection, observation or control, that he [or she] could if not overcome by violence or prevented by fear, retain his [or her] possession of [the vehicle].’”

# Crimes - - Possession of a Firearm by a Person Subject to a Restraining Order - - 18 U.S.C. § 922(g)(8) - - Collateral Attack on Restraining Order

*United States v. Bena*,  
664 F.3d 1180 (8<sup>th</sup> Cir. 2011)

§ 922(g)(8) defendant precluded  
from making Fifth and Sixth  
Amendment challenges to validity  
of underlying restraining order



“Bena’s argument is an impermissible collateral attack on the predicate no-contact order.”

# Crimes - - Mail Fraud / Wire Fraud - - 18 U.S.C. § 1341, 1343 - - Tenth Amendment

*United States v. Louper-Morris*,  
672 F.3d 539 (8<sup>th</sup> Cir. 2012)

**Circuit rejects 10<sup>th</sup> Amendment  
challenge to mail and wire fraud  
statutes**

## **TENTH AMENDMENT**

The powers not delegated to  
the United States by the  
Constitution, nor prohibited by  
it to the States, are reserved  
to the States respectively, or  
to the people.

“A Tenth Amendment challenge to a statute ‘necessarily’ fails if the statute is a valid exercise of a power relegated by Congress.”

•

“Congress’s Postal Power provides the jurisdictional basis for 18 U.S.C. § 1341, the mail fraud statute.”

•

“[S]ection 1343 [is] within the extensive reach of the Commerce Clause.”

# ACCA - - “Serious Drug Offense” - - Offering to Sell Drugs

***United States v. Bynum,***  
669 F.3d 880 (8<sup>th</sup> Cir. 2012)

**Minnesota felony for offering to sell  
drugs is a “serious drug offense” for  
ACCA purposes**



“[T]he ACCA requires only that predicate offenses ‘involve’ the manufacture, distribution, or possession of drugs.”

•

“Unlike the sentencing guidelines, 18 U.S.C. § 924(e)(2)(A)(ii) uses the term ‘involving,’ an expansive term that requires only that the conviction be ‘related to or connected with’ drug manufacture, distribution, or possession, as opposed to including those acts as an element of the offense.”

# Crimes of Violence / Violent Felonies - - “No Contest” Pleas

*United States v. Williams*,  
664 F.3d 719 (8<sup>th</sup> Cir. 2011)

**Nebraska “no contest” plea to  
escape from custody did not  
preclude its use as a crime of  
violence predicate**



“Just as a conviction can serve as a predicate offense when a defendant contests the facts at trial but is nevertheless found guilty, a conviction can serve as a predicate offense when a defendant refuses to admit the facts while pleading no contest.”

# Defenses - - Double Jeopardy - - Waiver

***United States v. Dolehide,***  
663 F.3d 343 (8<sup>th</sup> Cir. 2012)

**Defendant's guilty plea to two counts of possession of child pornography waived any defense that the convictions constituted double jeopardy**



“Delehide admitted his guilt to two distinct crimes by pleading guilty to two counts of possession of child pornography. Dolehide thus has waived his double jeopardy claim and we are foreclosed from reviewing that claim on appeal.”

# Speedy Trial Act - - 18 U.S.C. § 3161(h)(7)(A) - - Excludable Time - - Continuance Opposed by Defendant

*United States v. Herbst*,  
666 F.3d 504 (8<sup>th</sup> Cir. 2012)

**Continuance tolled speedy trial clock  
even though defendant opposed the  
continuance**



“[T]he plain language of section 3161(h)(7)(A) does not require a defendant’s consent to the continuance if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” (internal quotation marks omitted).

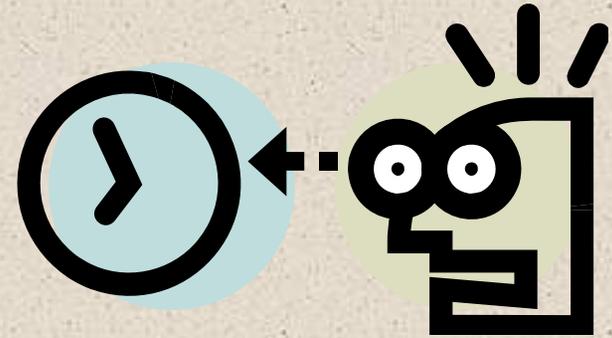
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“Herbst’s opposition to his counsel’s request for a continuance does not prevent that time from being excluded from the speedy trial calculation.”

# Speedy Trial Act - - 18 U.S.C. § 3161(h)(1)(D) - - Excludable Time - - Appeal from Detention Order

*United States v. Herbst*,  
666 F.3d 504 (8<sup>th</sup> Cir. 2012)

**Appeal of magistrate's detention  
order tolled the speedy trial clock**

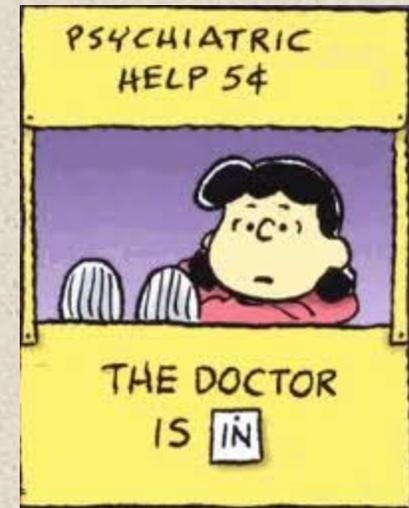


“Herbst argues that the court should not exclude the time period resulting from his appeal of the magistrate judge’s detention order because the appeal did not cause a delay in the criminal trial. The Supreme Court has recently held that a section 3161(h)(1)(D) exclusion remains applicable ‘irrespective of whether it actually causes, or is expected to cause, delay in starting a trial.’”

# Evidence - - Privileges - - Psychotherapist-Patient Privilege

***United States v. Ghane,***  
673 F.3d 771 (8<sup>th</sup> Cir. 2012)

**Statements to physician's assistant  
during E.R. intake process were  
outside scope of psychotherapist-  
patient privilege**



“The psychotherapist-patient privilege contemplates treatment. It does not encompass ‘care’ provided by an ER physician’s assistant whose job is to assess incoming patients and conduct intake interviews and evaluations. Ghane sought admission, not treatment, from [the physician’s assistant].”

# Evidence - - Privileges - - Psychotherapist-Patient Privilege - - “Dangerous Patient” Exception

*United States v. Ghane*,  
673 F.3d 771 (8<sup>th</sup> Cir. 2012)

**Circuit rejects “dangerous patient”  
exception to psychotherapist-  
patient privilege**



“[A]dopting a ‘dangerous patient’ exception to the psychotherapist-patient privilege would necessarily have a deleterious effect on the ‘confidence and trust’ the Supreme Court held is implicit in the confidential relationship between the therapist and a patient. . . .”

# Trial - - Evidence of Prior Acquittal on Rule 404(b) Conduct

*United States v. Vega*,  
\_\_\_ F.3d \_\_\_ (8<sup>th</sup> Cir. 2012)

**Evidence that prior jury acquitted defendant on one drug transaction did not preclude its use as 404(b) evidence at retrial on hung drug counts; evidence of the prior acquittal, however, was inadmissible**



' . . . Judgments of acquittal are not generally relevant, because they do not prove innocence; they simply show that the government did not meet its burden of proving guilt beyond a reasonable doubt.'

# Guidelines - - USSG § 2J1.6(b)(2) - - Failure to Appear - - “Underlying Offense” Enhancement

*United States v. Woodard*,  
675 F.3d 1147 (8<sup>th</sup> Cir. 2012)

**Failure to appear at revocation hearing netted defendant a 9-level enhancement, as “underlying offense” was the original offense of conviction (bank robbery) and not the supervised release violation**

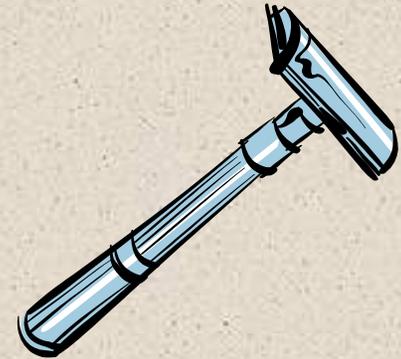


“After Woodard was convicted of and sentenced for three counts of bank robbery and one count of use of a firearm in the commission of a crime of violence, Woodard violated the terms of his supervised release. The court ordered him to appear for sentencing on October 20, 2009. He did not. Subsequently, the government filed a petition for contempt. Because this petition was based on Woodard’s failure to appear at a revocation hearing that arose from his earlier bank robbery and firearm convictions, the “underlying offense” was the bank robbery, not the supervised release violation.”

# Guidelines - - USSG § 5G1.3 - - Defendant Subject to an Undischarged Term of Imprisonment - - Distinguishing Subsections (b) and (c)

*United States v. Raysor*,  
661 F.3d 987 (8<sup>th</sup> Cir. 2011)

**District court erred in giving defendant credit for time served on state charge that did not increase offense level of instant federal offense**



“[S]ubsections (b) and (c) of section 5G1.3 uniquely apply in different scenarios. [S]ubsection (b) applies only where a defendant is subject to an undischarged term of imprisonment for another offense that is relevant conduct . . . and that was the basis for an increase in the offense level for the instant offense. In contrast, [w]hen a defendant has an undischarged sentence for offenses that are not relevant or only partially relevant to the instant offense, subsection (c) of § 5G1.3 applies. . . .” (internal quote marks omitted).

•

“[U]nlike section 5G1.3(b), which allows sentencing judges to give defendants credit for a period of imprisonment, section 5G1.3(c) does not allow a district court to adjust a sentence for time served.” (internal quote marks omitted).

# Guidelines - - USSG § 2G2.2(b)(3)(B) - - Distribution for the Receipt or Expectation of Receipt of a Thing of Value

*United States v. Dolehide*,  
663 F.3d 343 (8<sup>th</sup> Cir. 2011)

**Defendant's extensive knowledge  
and use of LimeWire justified five-  
level enhancement under  
§ 2G2.2(b)(3)(B)**



“[T]his Court requires a file-sharing defendant to show ‘concrete evidence’ of his ignorance as to distribution in order to defeat a finding with respect to distribution.”

•

“Dolehide urges the Court to follow the *Bastian* concurrence in which Judge Colloton questioned the prudence of applying the enhancement in cases where the evidence shows that the file sharing was merely gratuitous and thus not a ‘transaction’ as required by the applicable guideline. . . . Judge Colloton’s concurrence does not reflect the current state of the law in this Circuit.”

\*See *United States v. Spriggs*, 666 F.3d 1284 (11<sup>th</sup> Cir. 2012) (rejecting 8<sup>th</sup> Circuit approach).

# Guidelines - - USSG § 3B1.3 - - Position of Trust - - Landlord-Tenant Relationship

***United States v. Miell,***  
661 F.3d 995 (8<sup>th</sup> Cir. 2011)

**Abuse of position of trust  
enhancement was properly applied to  
landlord who fraudulently retained  
damage deposits from hundreds of  
renters**



“Miell . . . used his essentially unreviewable position of authority to facilitate and conceal his fraud, as his possession of the deposits put him in a position of power relative to tenants.”

•

“Whether a defendant holds a position of trust . . . turns on the nature of the defendant’s position and amount of discretion and control relative to the victim, not whether the victim subjectively trusted the defendant.”

# **Guidelines - - USSG § 2K2.1(a) - - Semiautomatic Firearm Capable of Accepting a Large Capacity Magazine - - Operability**

*United States v. Davis*,  
668 F.3d 576 (8<sup>th</sup> Cir. 2012)

**Enhanced offense level for possession of semiautomatic firearm capable of accepting large capacity magazine does not require that the firearm be operable (defendant's 9 mm pistol was inoperable because it was missing the trigger)**



“The term ‘firearm’ in Application Notes 1 and 2 must be given . . . the definition in 18 U.S.C. § 921(a)(3) which includes the many judicial decisions that have applied the definition to less-than-permanently inoperable weapons.”

# Guidelines - - USSG § 4A1.2(c) - - Determining Whether an Offense is “Similar to” a Listed Noncountable Offense - - Possession of Alcohol by a Minor

***United States v. Barrientos***,  
670 F.3d 870 (8<sup>th</sup> Cir. 2012)

Circuit recognizes that its holding in *U.S. v. Webb*, 218 F.3d 877 (8<sup>th</sup> Cir. 2000), that possession of alcohol by a minor is not “similar to” a juvenile status or public intoxication offense for § 4A1.2(c) purposes, is no longer controlling law in review of Amendment 709 (rejecting strict elements approach in favor of a generalized “common sense” approach to §4A1.2(c) similarity determination)

“Following the adoption of Amendment 709, Judge Bright warned that our prior cases concerning the ‘similar to’ question were no longer good law.”



# Sentencing - - Jumbo Variances - - Price-Fixing

*United States v. VandeBrake*,  
\_\_\_ F.3d \_\_\_ (8<sup>th</sup> Cir. 2012)

**Split panel affirms record 48-month price-fixing sentence, rejects “closer review” of district court’s policy disagreement with the antitrust guidelines**



“VandeBrake’s primary complaint regarding the substantive unreasonableness of his sentence is that its length equals the longest sentence ever imposed in an antitrust case. . . . The length of VandeBrake’s sentence, however, results in large part from the district court’s policy disagreement with the antitrust guidelines. The district court believed the antitrust guidelines are too lenient, and consequently gave VandeBrake a more severe sentence. . . .”

•

“The district court gave cogent reasons for its policy disagreement by comparing the antitrust guidelines to the fraud guidelines which attack a similar societal harm.”

# Sentencing - - Jumbo Variances / Departures - - Consecutive Sentencing

*United States v. Richart*,  
662 F.3d 1037 (8<sup>th</sup> Cir. 2011)

**Consecutive 60-month sentences  
held reasonable for false statement  
defendant with 0-6 guidelines range  
(Defendant lied about whereabouts of  
her niece, whom she had murdered)**



“[T]he district court determined that the circumstances of Richart’s offense were not typical, but were particularly egregious and out of the ordinary, justifying a significant upward variance. . . .”

•

“We do not agree with Richart that the sentence imposed by the district court was driven solely by its belief that her state sentence for Christina’s murder was inadequate.”

•

“ . . . I am of the opinion the court imposed the sentence it did to supplant what it perceived to be an inadequate state sentence. . . .”

- Bye, J., dissenting

# Sentencing - - Charging Concessions as a Sentencing Factor

***United States v. Forde,***  
664 F.3d 1219 (8<sup>th</sup> Cir. 2012)

**Sentencing court properly considered  
fact that government withheld § 851  
notices**



“We also reject Forde’s assertion it was improper . . . for the district court to consider the government’s decision not to file an information to establish prior convictions. . . .”

# Restitution - - Costs of Investigation and Prosecution

***United States v. Haileselassie***,  
668 F.3d 1033 (8<sup>th</sup> Cir. 2012)

**District court erred in awarding restitution for \$1400 “cost estimate” submitted by State lab for testing white powder enclosed in Anthrax threat letter**



“The cost of determining if an imminent threat to the safety of government workers or operations exists is a true involuntary victim cost directly and proximately caused by this type of offense. . . . However, it is well-settled that “[t]he costs of investigating and prosecuting an offense are not direct losses for which restitution may be ordered.”

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“[I]t did not take the State lab’s staff eighteen hours to determine there was no anthrax threat. Rather, after making that determination, the State Lab . . . went on to analyze the powder . . . for the purposes of gathering evidence in the criminal investigation.”

# Restitution - - Compensation by Third Party Insurer - - 18 U.S.C. § 3664(j)(1) - - Government Agency as Insurer

*United States v. Schmidt*,  
675 F.3d 1164 (8<sup>th</sup> Cir. 2012)

**South Dakota's medicaid program was entitled to restitution for monies paid for treatment of victim's injuries**



“[T]here is no practical distinction between a private insurer and the government when it acts as an insurer.”

# Supervised Release - - Special Conditions - - Internet Use Restriction

***United States v. Morais,***  
670 F.3d 889 (8<sup>th</sup> Cir. 2012)

**Circuit upholds Internet use  
restriction for receipt defendant  
who had extensive child porn  
collection**



“Despite some broad language in these prior decisions, we decline to construe *Wiedower* and *Crume* as establishing a *per se* rule that a district court may never impose a prior-approval Internet use restriction based on a defendant’s receipt and possession of child pornography.”

•

“The special condition at issue here is not a complete ban on use of the Internet. With prior approval of the probation office, Morais may access the Internet for legitimate purposes of research, communication, and commerce. Given the importance of the Internet as a resource, we expect that the probation office will not arbitrarily refuse such approval when it is reasonably requested and when appropriate safeguards are available.”

# Supervised Release - - Special Conditions - - Complete Ban on Use of Alcohol

***United States v. Forde;***  
***United States v. Tolliver,***  
664 F.3d 1219 (8<sup>th</sup> Cir. 2012)

**District court did not err in imposing alcohol  
ban for drug trafficking defendant who was  
“drug dependent”**



“ . . . Toliver has used marijuana *daily* for the past 13 years – approximately half of his life. His criminal history shows several arrests and convictions involving marijuana or cocaine.”

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Also see *United States v. Mosley*, 672 F.3d 586 (8<sup>th</sup> Cir. 2012) (upholding alcohol ban where gun defendant had mental health issues and dated history of drug abuse; Judge Bye dissented); *United States v. Anderson*, 664 F.3d 758 (8<sup>th</sup> Cir. 2012) (finding no plain error in alcohol ban for sex travel defendant who had a prior OWI, gave alcohol to the 13-year-old victim and her friend, and who belonged to Facebook groups called “All I want to do is get drunk and take pictures!!!” and “A Drunk Girls Guide to Social Graces.”).

# **EVIDENCE**

**PRESENTED BY**

**LAURIE DORÉ**  
**PROFESSOR**

# Current Issues in Evidence

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Federal Public Defender Seminar  
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## I. Restyled Federal Rules of Evidence

A. Effective December 1, 2011, the Federal Rules of Evidence underwent a comprehensive “style” revision that re-wrote every Federal Rule of Evidence.

1. According to the Advisory Committee Note that accompanies each restyled federal rule, the revisions are intended to make the rules “more easily understood and to make style and terminology consistent throughout the rule.” The changes are stylistic only and are not intended “to change any result in any ruling on evidence admissibility.”

B. Fed. R. Evid. 804(b)(3): Statements Against Penal Interest

1. Amended Rule:

**Fed. R. Evid. 804(b)(3) *Statement Against Interest.***

A statement that:

(A) a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

2. Amended December 1, 2010 to require corroboration of all statements against penal interest offered in criminal cases. Formerly, the Rule required only the accused to corroborate exculpatory statements against penal interest. Now, prosecutors must also offer “corroborating circumstances that clearly indicate [the] trustworthiness” of all statements that tend to expose any declarant to criminal liability.

## II. Confrontation Clause

### A. Pre-*Crawford* State of Affairs

1. U.S. Const. 6<sup>th</sup> amend.: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

- a. Right to be present at trial
- b. Right to Face-to-face confrontation
- c. Right to cross-examine

2. Hearsay: The receipt of hearsay against criminal accused raises potential Confrontation Clause problems, since the hearsay declarant is arguably a “witness” against the accused.

a. Language of the constitutional provision is susceptible to a variety of textually plausible interpretations.

1. One interpretation would require the exclusion of most hearsay, even the type that was routinely admitted at the time of the adoption of the amendment. At the opposite extreme, the clause might refer only to witnesses who testify against the accused at trial and would thus impose virtually no restriction on the introduction of hearsay or the creation of new hearsay exceptions.

2. The Supreme Court has never adopted any of these extreme interpretations and steered between absolute exclusion of hearsay and absolute deference to hearsay exceptions.

3. Confrontation Clause was not much of an issue until it was incorporated against the states in 1965. Even after that, under *Ohio v. Roberts*, 448 U.S. 56 (1980), Confrontation Clause did not impose much of a restriction on the admission of hearsay. Under *Roberts*, the Confrontation Clause could be avoided if the hearsay fell within a “firmly rooted” hearsay exception or if a court held that the statement had “particularized guarantees of trustworthiness.”

4. *Roberts* applied for 24 years (1980 – 2004) until *Crawford v. Washington*, 541 U.S. 36 (2004) was decided in 2004. *Crawford* dramatically transformed the law in this area and made the Confrontation Clause a much more significant barrier to the admission of hearsay against a criminal defendant.

## **B. Crawford v. Washington, 541 U.S. 36 (2004)**

1. Hearsay statement involved a recorded statement that defendant's wife made in response to police interrogation after having been Mirandized at the police station; statement was relevant to husband's self-defense claim. Statement qualified as declaration against wife's penal interest.

2. Supreme Court rejected the multi-factored reliability approach of *Ohio v. Roberts* and reformulated the appropriate constitutional inquiry.

3. Under *Crawford*, the Confrontation Clause bars the admission of "TESTIMONIAL" hearsay against a criminal accused UNLESS

a. The declarant is made available for cross-examination, OR

b. The declarant was "UNAVAILABLE" at trial AND the defendant had an earlier "OPPORTUNITY TO CROSS-EXAMINE" the declarant about the statement.

## **C. What is Testimonial?**

1. Confrontation Clause only applies to "testimonial" hearsay.

a. Non-testimonial hearsay, although still subject to exclusion under hearsay and other evidence rules, is exempt from Confrontation Clause analysis. See *Davis v. Washington*, 547 U.S. 813, 823-24 (2006); *Whorton v. Bockting*, 549 U.S. 406, 418-421 (2007). However, the due process clause of the 5<sup>th</sup> and 14<sup>th</sup> amendments may bar the admission of unreliable nontestimonial evidence. See *Michigan v. Bryant*, 131 S.Ct. 1143, 1162, n. 13 (2011).

2. *Crawford* only partially defined "testimonial," leaving it to be more fully defined in future cases.

a. "[T]estimony" is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact;"

b. "[S]tatements that declarants would reasonably expect to be used prosecutorially;"

c. "[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

d. Examples cited in *Crawford* include:

1. Prior testimony at a preliminary hearing (e.g., *Ohio v. Roberts*)

2. Grand Jury testimony
3. Prior trial testimony
4. Affidavits
5. Depositions
6. Custodial interrogations, confessions

See *Crawford*, 541 U.S. at 51.

3. The *Crawford* Court held that Sylvia Crawford's statement was testimonial. Though it was not made under oath or at a deposition, her statement was made in response to structured police interrogation at the police station and thus fell within the core concern of the Confrontation Clause.

4. Examples of Non-Testimonial Hearsay Not Subject to Confrontation Clause

a. Business Records?

1. *Crawford*, 541 U.S. at 56; *U.S. v. Mashek*, 606 F.3d 922 (8<sup>th</sup> Cir. 2010), cert. denied, 131 S. Ct. 1605 (2011). But see *infra* for a discussion of forensic documents that might qualify as business or public records)

b. Statements in Furtherance of Conspiracy

1. *Crawford*, 541 U.S. at 56; *U.S. v. Avila Vargas*, 570 F.3d 1004 (8<sup>th</sup> Cir. 2009); *U.S. v. Brown*, 560 F.3d 754 (8<sup>th</sup> Cir. 2009), cert. denied, 130 S. Ct. 2356 (2010).

c. Off-hand, casual remarks; statements to friends/neighbors (See *Davis*; *Giles* discussed *infra*)

d. Statements for purposes of medical diagnosis or treatment

1. *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n. 9 (2011); *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 2692-93 (2008).

e. Public records and reports; records of vital statistics

1. *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n. 9 (2011).

f. Records of religious organizations; marriage, baptismal, and similar certificates; family records (Id.)

g. Statements against Interest (Id.)

1. Are all statements against interest non-testimonial?

#### **D. Statements Made in Response to Police Questioning: Ongoing Emergencies and the “Primary Purpose” Test**

1. *Crawford* implied that statements made in response to police interrogation are “testimonial.” In subsequent cases, the Supreme Court qualified that suggestion and established a “primary purpose” test to delineate when statements made in the presence of government officers will qualify as testimonial.

##### **2. *Davis v. Washington*, 547 U.S. 813 (2006).**

a. *Davis* actually involved two domestic abuse cases that were consolidated for appeal before the Supreme Court.

1. *Davis v. Washington* involved statements made to a 911 operator by a domestic abuse victim who called 911, hung up before speaking to the operator, but responded to questions when the operator called the victim back.

2. *Hammon v. Indiana* involved statements made by the alleged victim of domestic abuse in response to inquiries by police officers responding to the scene of the abuse.

b. In admitting most of the 911 call (*Davis*), but excluding the statements made on the scene to responding officers (*Hammon*), the *Davis* court examined the “primary purpose” of the police questioning:

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

*Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273-74 (2006).

c. Thus, the existence of an “ongoing emergency” is a critical factor in determining the “primary purpose” of statements made in response to police questioning or in which government agents are involved in their production. The Court distinguished the holdings in *Davis* and *Hammon*.

1. In *Davis*, the ongoing emergency existed during most of the 911 call. The Court noted that the victim was describing events as they were happening. Any reasonable listener would perceive most of the 911 call as a plea for help in which both the 911 operator’s questions and the victim’s answers were necessary to resolve a present emergency.

a. Importantly, the Court recognized that the 911 call could have dealt first with an emergency and then eventually evolved into an interrogation with the primary purpose of establishing past facts relevant to criminal prosecution. *Davis*, 547 U.S. at 827.

2. In contrast, the statements and signed affidavit at issue in *Hammon* were made after the domestic abuse had occurred. There was no present emergency when police arrived and the declarant-victim was physically separated from the defendant during the police questioning of the victim. The statements were testimonial since they were made as “part of an investigation into possibly criminal past conduct.” *Id.* at 829-30.

### 3. **Michigan v. Bryant, 131 S.Ct. 1143 (2011).**

a. *Bryant* addressed the “primary purpose” inquiry in a non-domestic violence case involving statements made by a mortally wounded gunshot victim in response to police questioning. The police encountered the victim in a gas station parking lot where they had been called in response to a report of a shooting. After calling an ambulance, the police asked the victim to identify and describe his shooter, as well as the time and location of the shooting.

1. The *Bryant* Court held that the victim’s statements to the police were not testimonial because their “primary purpose” was to enable police assistance to meet an ongoing emergency. *Michigan v. Bryant*, 131 S.Ct. 1143, 1167 (2011). The *Bryant* Court cautioned that in a non-domestic violence case, a court should not assume that an emergency terminates once the threat to the first victim is neutralized since the threat to police, first responders, and the public may continue. *Id.* at 1158.

a. See also *U.S. v. Clemmons*, 461 F.3d 1057, 1060 (8<sup>th</sup> Cir. 2006) (holding under similar facts that shooting victim’s statements were nontestimonial because primary purpose of officer’s questions was to “assess the situation and to meet the needs of the victim.”).

2. In reaching this holding, the Court elaborated on the primary purpose test.

b. Objective Test: The *Bryant* Court indicated that the primary purpose test is an objective one in which the court must “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” The focus is not on the actual or subjective intent of the parties, but rather on “the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.” *Bryant*, 131 S. Ct. at 1156.

c. Mixed Motives: Whose Perspective?: The Court cautioned that the primary purpose should not be gauged from the perspective of only one of the participants –either the

declarant or the interrogator, since both may have mixed motives. Instead, “the statements and actions of both the declarant and the interrogators,” and “the contents of both the questions and the answers,” must be objectively assessed in determining the primary purpose of an interrogation.” *Bryant*, 131 S. Ct. 1160-61

1. Is this the correct perspective? Cf. *U.S. v. Honken*, 541 F.3d 1146 (8<sup>th</sup> Cir. 2008), cert. denied, 130 S.Ct. 1011 (2009) (indicating that proper focus under Confrontation Clause is on the expectations of the declarant, not on the recipient of the information).

2. How should courts evaluate statements by and to confidential informants?

d. Ongoing Emergency: Existence of an ongoing emergency, which is a highly context-dependent determination, is a very significant (though not dispositive) factor in determining primary purpose. In determining the existence, duration, and scope of an emergency, a court should objectively assess (from the perspective of a “reasonable participant”) a number of factors:

1. Actions and statements of both parties

a. See also *Davis*, 547 U.S. 813, 126 S.Ct. 2266, 2278 (looking at whether the statement in question is an obvious substitute for testimony by replicating what a live witness would do on direct examination; is declarant seeking aid or telling story?).

2. Condition of declarant – medical and mental condition

3. Existence and nature of weapons, if any, used

4. Nature of the case: domestic violence directed at (and limited to) specific individual v. non-private dispute involving continuing threat to public, police, and first responders

5. Formality of encounter and questions

a. See also *Davis*, 547 U.S. 813, 126 S.Ct. 2266, 2276-77 (suggesting that courts evaluate the formality of the process by which statement obtained, as well as whether statement was made under circumstances where the declarant is aware of the severe consequences resulting from deliberate falsehoods).

4. Implications of *Davis* and *Bryant*:

a. Return to multi-factored reliability test? What weight should be given to the primary purpose factors mentioned in *Bryant*? What additional circumstances might be relevant in determining primary purpose of an interrogation?

b. What is the scope of an “ongoing emergency”? When will a present emergency evolve into testimonial statements designed to establish past facts relevant to subsequent prosecution? What ends an ongoing emergency?

c. Does *Bryant* create “an expansive exception to the Confrontation Clause for violent crimes”? See *Bryant* (Scalia, J., and Ginsberg, J., dissenting).

## **E. Business Records, Public Records, Forensic Reports and Analyses**

1. Court in *Crawford* suggested that business records are not testimonial. *Crawford*, 541 U.S. at 56. See also *U.S. v. Mashek*, 606 F.3d 922 (8<sup>th</sup> Cir. 2010), cert. denied, 131 S.Ct. 1605 (2011) (characterizing pharmacy logs that recorded pseudoephedrine purchases and that were kept in ordinary course of business as nontestimonial business records).

a. *Crawford* left open the question of whether business or public records created in connection with a criminal prosecution are testimonial. The Court began answering this question in two subsequent cases (*Melendez-Diaz* and *Bullcoming*) that have significant consequences for a wide variety of records routinely admitted in criminal cases. The decision in a third case argued this term (*Williams v. Illinois*) could have serious implications for criminal defendants by determining whether prosecutors can bypass the constitutional hurdles erected in *Melendez-Diaz* and *Bullcoming* through the use of expert witnesses.

### **2. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) [Scalia 5-4]**

a. In *Melendez-Diaz*, a state statute permitted the prosecution to offer a certified lab report from the state crime lab as prima facie evidence of the composition and weight of drugs seized from the accused. The Court held that the certificates were clearly “testimonial” because the analysts’ statements were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Because the prosecution had made no showing that the lab analyst was unavailable to testify at trial and that the accused had had a prior opportunity to cross-examine the analyst, the defendant’s Sixth Amendment rights were violated. *Melendez-Diaz*, 129 S. Ct. at 2531-32.

c. Opportunity for Accused to subpoena analyst insufficient. *Id.* at 2540.

d. Notice and Demand Statutes Constitutional?

1. Court approved of statutes (like Iowa’s) that require prosecution to give an accused timely notice of its intent to use a certificate and that require the defendant to make a timely demand that the witness appear at trial or waive the right of confrontation. *Id.* at 2540-42.

2. May such statutes require that an accused demonstrate good cause or an actual intent to cross-examine analyst before demanding that witness appear at trial?

e. *Melendez-Diaz* prohibits the prosecution from introducing testimonial forensic reports and records without calling a live witness who can be cross-examined by the accused. But who must testify?

**3. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) [Ginsburg 5-4]**

a. In *Bullcoming*, the defendant was convicted of driving while grossly intoxicated based on a Report of Blood Alcohol Contents that certified that the defendant's blood contained "inordinately high levels" of alcohol. The lab analyst who actually prepared the Report was on unpaid leave and thus did not testify. Instead, the prosecution called another analyst who was familiar with the lab devices and the laboratory's testing procedures, but who did not sign the certification or perform or observe the lab test. The *Bullcoming* Court held that the Sixth Amendment prohibited the prosecution from introducing the testimonial lab report through such "surrogate" testimony.

1. Original analyst who performed the analysis and signed the certification was not a mere scrivener who simply transcribed the results of machine-generated data. Instead, the forensic analyst made certifications concerning the chain of custody, his performance of tests and adherence to protocols, the integrity of the sample, and the validity of his analysis. These certifications, "relating to past events and human actions not revealed in raw, machine-produced data," together with the veracity, proficiency, and care taken by the original analyst, were all subjects that the accused had a right to explore through cross-examination of the author of the Report.

b. Open Questions:

1. If a surrogate witness is insufficient, who must prosecution call to present the forensic record? Every witness in chain of custody? Every analyst who played role in creation of report? (Kennedy dissent)

2. Alternative Purpose: What if Report had been generated in order to provide accused with medical treatment or for some purpose other than use in a prosecution? (*Bullcoming*, 2011 WL 2472799, at \*15 (Sotomayor, J., concurring))

3. Another Surrogate: What if testifying surrogate had been "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"? (*Bullcoming*, 2011 WL 2472799, at \*15 (Sotomayor, J., concurring)).

4. Mere Scrivener: what if prosecution were to introduce only machine-generated raw data?

5. Possibility for Retesting: Would it be permissible or possible for government to retain samples and have new analysts retest them for purposes of trial? (Ginsburg concurrence)

6. Independent Expert: What if the prosecution calls an independent expert who relies on a testimonial forensic report (not admitted into evidence) in forming his or her expert opinion?

a. A number of federal courts have permitted this arguable end-run around the Sixth Amendment by reasoning that the reports are not being admitted to prove the truth of their contents, but only to assist the jury in evaluating the expert's opinion. See *U.S. v. Pablo*, 625 F.3d 1285 (10<sup>th</sup> Cir. 2010)(petition for cert. filed); *U.S. v. McGhee*, 627 F.3d 454 (1<sup>st</sup> Cir. 2010), on reh'g, 651 F.3d 153 (1<sup>st</sup> Cir. 2011).

b. Pending case, *Williams v. Illinois*, will decide

#### **4. Williams v. Illinois (argued Dec. 6, 2011, decision pending)**

a. *Williams* raises the question left open by *Bullcoming*: whether the government can introduce a forensic analyst's report on a DNA test of evidence by offering it through the in-court testimony of an expert who had no part in making the analysis and no personal knowledge of how the test was performed.

b. *Williams* involved a DNA lab test in a rape case. The Illinois police lab sent the biological evidence to Cellmark Diagnostic Laboratory in Maryland. When Williams was arrested on an unrelated charge, he gave a blood sample and his DNA matched that of the assailant in the rape case. No analyst from Cellmark testified at Williams' trial and the Cellmark lab report was not entered into evidence. Instead, the prosecution called an expert witness who stated that she had done an independent review of the data in the report and who offered her opinion that the DNA from the rape assailant and from Williams matched.

c. The government argued that Williams' Confrontation rights were not violated because Williams had the opportunity to cross-examine the testifying expert and experts are allowed to base their opinions on evidence that is not admitted. See Fed. R. Evid. 703 ("If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."). Williams argued that the Confrontation Clause requires that he have had an opportunity to cross-examine the analyst who prepared the report on which the expert relied and that the prosecution should not be permitted to make such an end-run around the Sixth Amendment.

d. Implications of *Williams*?

1. Common for states to send DNA samples to independent laboratories; common for experts to rely upon DNA tests that they did not conduct; DNA testing frequently involves multiple steps and multiple analysts.

2. If permissible, will prosecution be able to circumvent the Confrontation Clause by having experts testify based upon a lab report without introducing that report into evidence or calling the analyst who prepared the report?

3. If impermissible, will Confrontation Clause cripple prosecutions when analysts are unavailable or many analysts involved? Will prosecutors forgo forensic DNA analysis and prosecute rape and murder cases on unreliable eyewitness testimony?

a. See *Melendez-Diaz* (Kennedy, J., dissenting) (“The court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone.” “Guilty defendants will go free, on the most technical grounds, as a direct result of today’s decision, adding nothing to the truth-finding process.”

b. See *Bullcoming* (Kennedy, J., dissenting) (“And if the defense raises an objection and the analyst is tied up in another court proceeding; or on leave; or absent; or delayed in transit; or no longer employed; or ill; or no longer living, the defense gets a windfall.”).

4. Will Supreme Court create an exception to *Melendez-Diaz* and *Bullcoming* for reports from independent, accredited crime labs?

5. What other types of records might be affected?

a. Autopsy Reports

b. Laboratory Reports involving DNA, blood, or ballistics

c. Certificates of Nonexistence of Records

d. Certified Public Records

e. Records of Prior Convictions

f. Other records?

## **F. If Testimonial, When, if ever, Admissible?**

### 1. Declarant Called as Witness

### 2. Statement Not Offered for Truth of Matter Asserted

a. See Crawford, 541 U.S. 36, 59 n.9 (stating that the Sixth Amendment does not prevent “the use of testimonial statements for purposes other than establishing the truth of the matter asserted”).

### 3. Statements of a Party Opponent under Fed. R. Evid. 801(d)(2)(A) and (B)

### 4. Dying Declarations?

a. Supreme Court has suggested, but never decided, that statements admitted as dying declarations under Fed. R. Evid. 804(b)(2), even if testimonial, may be a *sui generis* historical exception to the Confrontation Clause. See Bryant, 131 S. Ct. at 1151, n.1; Giles v. California, 554 U.S. 353, 358-59(2008); Crawford, 541 U.S. at 56, n. 6.

### 5. Forfeiture by Wrongdoing.

a. Demonstrate that accused procured the unavailability of the declarant by engaging in conduct intended to prevent the declarant from testifying and thereby forfeited constitutional objection.

b. See Crawford, 541 U.S. at 54 (indicating that an accused could forfeit his right to cross-examine even testimonial statements if his own wrongdoing made the declarant unavailable); Giles v. California, 554 U.S. 353 (2008) (holding that an accused can forfeit his right of confrontation only if the prosecution establishes, by a preponderance of the evidence, that the accused engaged in conduct *designed* to prevent the witness from testifying).

1. Cf. Fed. R. Evid. 804(b)(6) (providing that person forfeits hearsay objection only if he “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”).

### 6. Declarant Unavailable AND Prior Opportunity to Cross

#### a. Unavailable:

1. What does “unavailability” mean for purposes of the Confrontation Clause? What does prosecution need to demonstrate to establish unavailability of declarant? What efforts must prosecution use to procure attendance of declarant?

2. Do we use the hearsay test of Fed. R. Evid. 804(a) to determine unavailability for constitutional purposes?

b. Prior Opportunity to Cross-Examine?

1. What if, as is typical of preliminary hearings, the accused asks no questions or conducts only de minimus questioning for discovery purposes? Is opportunity to cross sufficient?

2. Do we use the test from the former testimony hearsay rule for purposes of the Confrontation Clause? See Fed. R. Evid. 804(b)(1)(B) (“opportunity and similar motive” to develop former testimony now offered against party).

**III. Other Crimes/Wrongs: Fed. R. Evid. 404(b)**

**A. Rule:**

**Fed R. Evid. 404(b) Crimes, Wrongs, or Other Acts.**

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

**B. Avoiding Rule 404(b): Intrinsic Evidence and the Inextricably Intertwined Doctrine**

1. Fed. R. Evid. 404(b) only applies to “extrinsic” evidence of “*other*” crimes, wrongs, or acts. Its restrictions thus do not apply to “intrinsic” evidence of crimes, wrongs, or acts that, while technically uncharged, are inseparable from and “inextricably intertwined” with the charged crime. U.S. v. Hall, 604 F.3d 539, 543 (8<sup>th</sup> Cir. 2010); U.S. v. Washington, 596 F.3d 926, 946 (8<sup>th</sup> Cir. 2010), cert. denied, 131 S. Ct. 336 (2010).

2. Although most federal courts, including the Eighth Circuit, use the “inextricably intertwined” doctrine in determining whether evidence of uncharged crimes and bad acts is “intrinsic” or “extrinsic,” the Circuits employ a variety of tests and definitions for determining whether an act is “inextricably intertwined” with a charged offense. See U.S. v. Green, 617 F.3d 233, 245-246 (3<sup>rd</sup> Cir. 2010), cert. denied 131 S. Ct. 363 (2010) (discussing the history and status of the inextricably intertwined doctrine in federal courts). In the Eighth Circuit, “[e]vidence of other crimes or acts is inextricably intertwined if it is ‘an integral part of the immediate context of the crime charged.’” Hall, 604 F.3d at 543 (quoting U.S. v. Rolett, 151 F.3d 787, 791 (8<sup>th</sup> Cir.

1998)). Additionally, evidence of other crimes is considered “intrinsic” “when it is offered for the purpose of providing the context in which the charged crime occurred. . .” or to “complete the story or provide a total picture of the charged crime.” Washington, 596 F.3d at 946.

3. Rule 404(b) v. Inextricably Intertwined Evidence: If uncharged act evidence provides necessary background or truly completes the story of the charged crime, it may well qualify for admission under Rule 404(b) anyway. Other crimes evidence may be admissible if offered for *any* non-propensity purpose, Fed. R. Evid. 404(b), and the need to provide helpful background information or to prevent jury confusion by maintaining narrative integrity are both legitimate non-character purposes. See Hall, 617 F.3d at 249-50 (noting that “one proper purpose under Rule 404(b) is supplying helpful background information to the finder of fact). If evidence is admitted under Rule 404(b), however, the prosecution must provide the criminal defendant with advance notice “of the general nature of any such evidence,” Fed. R. Evid. 404(b)(2), and identify the particular non-propensity purpose for which the evidence is offered. In addition, the trial court will be required to give a limiting instruction upon request. In contrast, if uncharged conduct is deemed “intrinsic” because it is inextricably intertwined with the charged offense (and thus not an “other” act), Rule 404(b) does not apply and its procedural safeguards can be bypassed. See Hall, 617 F.3d at 249.

4. Criticisms of Inextricably Intertwined Doctrine: In 2010, the Iowa Supreme Court criticized the inextricably intertwined doctrine and significantly limited its applicability and scope in Iowa state courts. *State v. Nelson*, 792 N.W.2d 414, 423-24 (Iowa 2010). Likewise, both the Third and the Seventh U.S. Circuit Courts of Appeal have eliminated or restricted the inextricably intertwined doctrine. See *U.S. v. Green*, 617 F.3d 233, 246-249 (3d Cir. 2010), cert. denied 131 S. Ct. 363 (2010); *U.S. v. Gorman*, 613 F.3d 711, 719 (7<sup>th</sup> Cir. 2010). Along with many commentators, these courts recognize that the inextricably intertwined doctrine is a vague, amorphous doctrine that invites sloppy analysis and results-oriented decision-making. Its overly broad application can eviscerate Rule 404(b) by admitting evidence of uncharged wrongs that are likely to reflect badly on a defendant’s character without providing the Rule’s procedural protections. See *Green*, 617 F.3d at 248 (“the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b); *Gorman*, 613 F.3d at 719 (holding that inextricably intertwined doctrine has “outlived its usefulness” and that “[h]enceforth, resort to inextricable intertwining is unavailable when determining a theory of admissibility.”). Contrary to the approach in most federal courts, these courts have properly characterized intrinsic evidence as a limited and infrequent exception to the general rule against admitting evidence of other crimes, wrongs or acts.

a. In *Nelson*, the Iowa Supreme Court stated that it will permit other act evidence to complete the story a crime only when “the charged and uncharged acts . . . form a continuous transaction” or “when a court cannot sever this evidence from the narrative of the charged crime

without leaving the narrative unintelligible, incomprehensible, confusing, or misleading.” Nelson, 791 N.W.2d at 423-24.

b. In the Third Circuit, uncharged act evidence is intrinsic only if it directly proves the charged offense or if the uncharged acts are performed contemporaneously with and facilitate the commission of the charged crime. Green, 617 F.3d at 248-49.

c. Finally, in the Seventh Circuit, evidence that is not direct evidence of the crime itself “is usually propensity evidence simply disguised as inextricable intertwinement evidence and is therefor improper, at least if not admitted under the constraints of Rule 404(b).” Gorman, 613 F.3d at 718.

d. See also State v. Ferrero, 274 P.3d 509 (Ariz. 2012); State v. Rose, 19 A.3d 985 (N.J. 2011); State v. Fetelee, 175 P.3d 709 (Hawaii 2008) (similarly narrowing or entirely abandoning intrinsic evidence doctrine).

### **C. Rule 404(b) Analysis:**

1. Is there sufficient evidence that the defendant committed the uncharged misconduct? (Fed. R. Evid. 104(b))

2. If there is sufficient evidence, is the uncharged misconduct offered for some purpose other than showing character? (Fed. R. Evid. 404(b)(2))

3. Is that non-character purpose relevant to a disputed issue in the case? (Fed. R. Evid. 401, 402)

4. Is the probative value of the extrinsic offense substantially outweighed by the danger of unfair prejudice? (FRE 403, 105).

### **D. Non-Character Purposes: MIMIC KOP**

1. Motive, Intent, Mistake (Absence of), Identity, Common Plan/Scheme, Knowledge, Opportunity, Preparation

2. The Expanding (and Impermissible?) Use of Other Drug Crime Evidence to Prove “Intent” under Rule 404(b)

a. Unlike other purposes listed in Rule 404(b), intent is often a required element of the charged offense or claim. In that context, other crimes evidence, demonstrating factors such as motive, knowledge, or common scheme, is often offered because of its claimed relevance

to proof of intent. Intent is basically the state of mind that indicates the individual acted deliberately, not accidentally or inadvertently.

b. Of all the non-propensity purposes listed in Rule 404(b), however, intent is the exception most likely to blur with improper propensity uses. That is, evidence of prior unrelated acts to show intent on the charged occasion often demonstrates more about propensity and a defendant's bad character than it circumstantially demonstrates about present intent to commit the charged offense. If prior acts evidence demonstrates that a defendant intentionally committed an act because of the defendant's character, such evidence should not be admitted under Rule 404(b) under the guise of proving intent.

c. Drug prosecutions present one category of cases in which this blurring of intent and propensity frequently occurs. Numerous federal courts, including the Eighth Circuit, have admitted evidence of a defendant's prior possession or sale of drugs as highly probative of knowledge or intent to commit current drug trafficking offenses.

1. For a sampling of just some of the 8<sup>th</sup> Circuit cases admitting sufficiently similar and non-remote drug offenses to prove knowledge or intent with respect to current drug distribution charges, see, e.g., *U.S. v. Samuels*, 611 F.3d 914, 918 (8<sup>th</sup> Cir. 2010), cert. denied, 131 S.Ct. 1583 (2011) (holding that “[p]rior felony drug convictions are relevant to show intent or knowledge in drug prosecution when a defendant makes general denial defense which . . . places the defendant’s state of mind at issue.”) (quoting *U.S. v. Hawkins*, 548 F.3d 1143, 1147 (8<sup>th</sup> Cir. 2008)); *U.S. v. Winn*, 628 F.3d 432, 436 (8<sup>th</sup> Cir. 2010) (allowing drug evidence collected from defendant’s person and car following 2007 traffic stop to prove knowledge and intent in current incident which “similarly involved possession, while in a vehicle, of a significant quantity of marijuana, a firearm, a digital scale, and baggies”); *U.S. v. Crippen*, 627 F.3d 1056 (8<sup>th</sup> Cir. 2010), cert. denied, 131 S. Ct. 2914 (2011) (prior drug convictions involved the same conduct implicated in the current case, were within seven years of defendant’s trial, and were probative of defendant’s intent to enter into a conspiracy to manufacture meth); *U.S. v. Trogdon*, 575 F.3d 762 (8<sup>th</sup> Cir. 2009), cert. denied 130 S. Ct. 1116 (2010) (admitting 11-year-old conviction of conspiracy to distribute marijuana to show defendant’s intent regarding charged conspiracy to distribute marijuana; defendant placed his intent in issue by denying conspiracy and raising “mere presence” defense); *U.S. v. James*, 564 F.3d 960 (8<sup>th</sup> Cir. 2009), cert. denied 130 S. Ct. 433 (2009) (holding that defendant’s prior drug conviction was admissible to establish intent to possess and distribute cocaine in light of defendant’s “mere presence” claim that he was loitering at the scene of a drug transaction and that he received marked currency by panhandling undercover officers); *U.S. v. Benitez*, 531 F.3d 711 (8<sup>th</sup> Cir. 2008) (admitting prior conviction for possessing cocaine in prosecution for possessing methamphetamine with intent to distribute; fact that prior offense involved another drug was not significant as both cocaine and meth are illegal and prior act was probative on issues of knowledge and intent to distribute); *U.S. v. Anthony*, 537 F.3d 863 (8<sup>th</sup> Cir. 2008), cert.

denied 555 U.S. 1080 (2008) (general denial in drug prosecution put defendant’s intent in issue and opened door for government to introduce prior convictions to prove intent).

d. Some courts have recognized that the “admission of prior drug crimes to prove intent to commit present drug crimes has become too routine,” and that “[c]loser attention needs to be paid to the reasons for using prior drug convictions—to lessen the danger that defendants . . . will be convicted because the prosecution invited, and the jury likely made, an improper assumption about propensity to commit drug crimes.” U.S. v. Miller, 673 F.3d 688, 696 (7<sup>th</sup> Cir. 2012). In *Miller*, for example, the Seventh Circuit recently backed away from its many prior cases admitting prior drug crimes to show intent in drug prosecutions. The *Miller* court noted that intent is not automatically put in dispute by a not guilty plea in a drug prosecution or even in cases involving a specific intent crime like possession with intent. According to that court, “[w]hen . . . intent is not meaningfully disputed by the defense, and the bad acts evidence is relevant to intent only because it implies a pattern or propensity to so intend, the trial court abuses its discretion by admitting it.” *Id.* at 697. Moreover, even if in dispute, “intent” should not be an automatic ticket to admission of prior drug crimes. As with any Rule 404(b) analysis, the trial court must assess the probative value of the prior act to prove present intent AND must weigh that probative value against the unfair tendency of the evidence to suggest a propensity to commit similar crimes. *Id.*

e. The Iowa Supreme Court has similarly rejected the use of prior drug transactions or convictions to prove that a defendant in the current case possessed drugs with the same intent. See *State v. Sullivan*, 679 N.W.2d 19 (Iowa 2004).

#### **IV. Impeachment of Accused with Prior Conviction**

##### **A. Rule**

###### **Rule 609(a): Impeachment by Evidence of a Criminal Conviction**

(a) **In General.** The following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness’s admitting — a dishonest act or false statement.

## **B. Special Balancing Test for Impeachment of Accused**

1. Rules require heavier burden on admissibility of convictions to impeach a criminal defendant than is required to impeach witnesses in civil cases or non-accused witnesses in criminal cases.

2. The advisory committee’s note to Fed. R. Evid. 609 explains the need for a special balancing test when prior convictions are used to impeach an accused witness:

The [1990] amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. The rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—i.e., the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.

Fed. R. Evid. 609 advisory committee’s note to 1990 amendment (emphasis added).

3. Balancing Factors: In deciding whether to permit the prosecution to impeach an accused with a prior conviction, a number of factors should be assessed:

a. The impeachment value of the prior crime

1. Assumes some felonies are more probative of truth-telling than others – which ones?

b. The point in time of the conviction and the witness’ subsequent history

1. Special rule for convictions over 10 years old (Fed. R. Evid. 609(b)).

c. The similarity between the past crime and the charged crime

1. Which way does similarity cut? For 609 purposes? For 404(b) purposes?

d. The importance of the defendant’s testimony

1. Does this make felony conviction more or less admissible?

e. The centrality of the credibility issue.

See *U.S. v. Jimenez*, 214 F.3d 1095 (9<sup>th</sup> Cir. 2000); *U.S. v. Sloman*, 909 F.2d 176 (6<sup>th</sup> Cir. 1990) (listing these factors).

4. Are courts seriously engaging in this special balancing test? Are courts properly considering and weighing the relevant factors?

## **V. Electronic and Social Media Evidence**

**A. Types of Evidence:** Facebook, Twitter, Emails, Web Pages, Blogs, Text Messages

**B. Leading Case:** *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (suggesting comprehensive approach to evidentiary issues presented by electronic media).

### **C. Hearsay Issues**

1. Statements of an Opposing Party (Fed. R. Evid. 801(d)(2))
2. Excited Utterance (803(2))
3. Present Sense Impression (803(1))
4. State of Mind (803(3))
5. Hearsay within hearsay problem: (805)

### **D. Authentication Issues**

1. Fed. R. Evid. 901(a): “proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”

- a. 104(b) question: evidence sufficient to support a finding of authenticity
2. Two components to authenticate
  - a. Original communication (i.e., blog post)
  - b. Tangible download (i.e., screenshot) of original message
3. Authentication of original communication
  - a. 901(b)(1): Testimony by witness with knowledge

b. 901(b)(4): “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances”

c. Suggested Methods:

1. Admission of person who created post
2. Searching alleged creator’s computer and browsing history
3. Information from social networking website that links profile to alleged creator

creator

4. Authentication of Download Document/Photo

a. Affidavits or testimony that download accurately represents the original message

5. Should Heightened Authentication Standards Be Required for Social Networking Evidence?

a. See *Griffin v. State*, 19 A.3d 415, 423-24 (Md. 2011) (noting “potential for abuse and manipulation of a social networking site by someone other than its purported creator and/or user” and requiring “greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site” to ensure that person actually created post).

b. See also *People v. Clevestine*, 891 N.Y.S.2d 511, 513 (N.Y. App. Div. 2009) (admitting defendant’s sexually explicit conversations with victims on MySpace after victims testified about exchanging messages, state police investigator from computer crime unit testified that he had retrieved messages from victims’ computers, and defendant’s wife testified that she had viewed messages on defendant’s MySpace account while on their computer).

6. See generally Deborah Jones Merritt, *Social Media, The Sixth Amendment, and Restyling: Recent Developments in the Federal Law of Evidence*, 28 *Touro L. Rev.* 27 (2012); Katelyn Bries, *A Lawyer’s Guide to the Admissibility of Social Networking Evidence: Authentication and Hearsay* (paper on file with author).

## V. Conclusion and Other Pertinent Issues?

# **ETHICS**

**PRESENTED BY**

**TRINITY BRAUN-ARANA**

**ASST. DIRECTOR**

**FOR**

**BOARDS AND COMMISSIONS**

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### Client Security Commission

Client Security Commission  
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Des Moines, Iowa 50319  
(515) 725-8029

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The Client Security Commission manages a fund, generated from contributions from lawyers and judges, that reimburses clients of lawyers who have misappropriated or lost a client's money. The purpose of the fund is to prevent defalcations by members of the Iowa bar, and insofar as practicable, to provide for the indemnification by the profession for losses caused to the public by the dishonest conduct of members of the bar of this state. The fund also covers the cost of administering the lawyer disciplinary system and other programs which impact the disciplinary system. The commission advises the court on policies involving the administration of the fund.

#### **New Rule Changes!**

The Court recently adopted several changes in Division III of the Iowa Court Rules, pertaining to various matters within the scope of professional regulation. One key change was the adoption of the substance of a recommendation made by the Client Security Commission last year regarding limited coverage of client security claims arising after a lawyer is suspended. Rule 39.9 is affected by that change. Another key change is adoption of specific trust account record keeping requirements, based on the ABA model rules. Rule 45.2 is affected by this change. As explained in the summary published with the rule change:

Iowa Court Rule 39.9 is amended to adopt the ABA model rule approach to coverage of client security claims arising after a lawyer's license has been suspended. Claims arising from conduct after entry of a suspension order will be covered, but only if the client's reliance on the state of the lawyer's license is reasonable. However, the amendment also adopts the Michigan qualification that if the conduct giving rise to the claim occurs more than six months after a lawyer's suspension, that reliance would be presumed unreasonable. In any event, revocation would constitute a bright-line date beyond which no claim could arise and be honored.

Iowa Court Rule 45.2 is amended to incorporate the general record keeping and electronic records provisions of the ABA Model Rules for Client Trust Account Records, adopted by the ABA on August 9, 2010. The amendment also reflects informal guidance the Iowa Client Security Commission has provided lawyers during audits and seminars for several years regarding their record keeping obligation. Until now, however, specific guidance regarding required record keeping has not been included in the Iowa rules. The amendment leaves intact the provisions of Iowa Court Rules 45.7 through 45.10, which generally incorporate the court's guidance regarding advances for fees and costs first set out in *Board of Professional Ethics & Conduct v. Apland*, 577 N.W.2d 50 (Iowa 1998).

A copy of the rule changes, adopting order, and a short summary are available here:  
[Rule Changes](#)

**CHAPTER 45**  
**CLIENT TRUST ACCOUNT RULES**

Rule 45.1	Requirement for client trust account
Rule 45.2	Action required upon receiving funds, accounting, and records
Rule 45.3	Type of accounts and institutions where trust accounts must be established
Rule 45.4	Pooled interest-bearing trust account
Rule 45.5	Definition of “allowable monthly service charges”
Rule 45.6	Lawyer certification
Rule 45.7	Advance fee and expense payments
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Rule 45.9	Special retainer
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## CHAPTER 45 CLIENT TRUST ACCOUNT RULES

**Rule 45.1 Requirement for client trust account.** Funds a lawyer receives from clients or third persons for matters arising out of the practice of law in Iowa shall be deposited in one or more identifiable interest-bearing trust accounts located in Iowa. The trust account shall be clearly designated as “Trust Account.” No funds belonging to the lawyer or law firm may be deposited in this account except:

1. Funds reasonably sufficient to pay or avoid imposition of fees and charges that are a lawyer’s or law firm’s responsibility, including fees and charges that are not “allowable monthly service charges” under the definition in rule 45.5, may be deposited in this account; or

2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited in this account, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Other property of clients or third persons shall be identified as such and appropriately safeguarded. [Court Order April 20, 2005, effective July 1, 2005]

**Rule 45.2 Action required upon receiving funds, accounting, and records.**

**45.2(1) Authority to endorse or sign client’s name.** Upon receipt of funds or other property in which a client or third person has an interest, a lawyer shall not endorse or sign the client’s name on any check, draft, security, or evidence of encumbrance or transfer of ownership of realty or personalty, or any other document without the client’s prior express authority. A lawyer signing an instrument in a representative capacity shall so indicate by initials or signature.

**45.2(2) Accounting and returning funds or property.** Except as stated in this chapter or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and shall promptly render a full accounting regarding such property.

**45.2(3) Maintaining records.**

*a.* A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these rules and required by Iowa R. of Prof’l Conduct 32:1.15 and shall retain the following records for a period of six years after termination of the representation:

(1) Receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(2) Ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(3) Copies of retainer and compensation agreements with clients as required by Iowa R. of Prof’l Conduct 32:1.5;

(4) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(5) Copies of bills for legal fees and expenses rendered to clients;

(6) Copies of records showing disbursements on behalf of clients;

(7) The physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, prenumbered canceled checks, and substitute checks provided by a financial institution;

(8) Records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient, and the trust account name or number from which money is withdrawn;

(9) Copies of monthly trial balances and monthly reconciliations of the client trust accounts maintained by the lawyer; and

(10) Copies of those portions of client files that are reasonably related to client trust account transactions.

*b.* With respect to trust accounts required by Iowa R. of Prof’l Conduct 32:1.15:

(1) Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account;

(2) Receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and

(3) Withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized bank transfer.

c. Records required by this rule may be maintained by electronic, photographic, computer, or other media provided that the records otherwise comply with these rules and that printed copies can be produced. These records shall be accessible to the lawyer.

d. Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of the records specified in this rule.

e. Upon the sale of a law practice, the seller shall make appropriate arrangements for the maintenance of the records specified in this rule.

[Court Order April 20, 2005, effective July 1, 2005; February 20, 2012]

**Rule 45.3 Type of accounts and institutions where trust accounts must be established.** Each trust account referred to in rule 45.1 shall be an interest-bearing account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company selected by the law firm or lawyer in the exercise of ordinary prudence. The financial institution must be authorized by federal or state law to do business in Iowa and insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. Interest-bearing trust funds may be placed in accounts at credit unions only to the extent that each individual client's funds are eligible for insurance. Interest-bearing trust funds shall be placed in accounts from which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to observe by law or regulation.

[Court Order April 20, 2005, effective July 1, 2005; April 25, 2008]

**Rule 45.4 Pooled interest-bearing trust account.**

**45.4(1) Deposits of nominal or short-term funds.** A lawyer who receives a client's or third person's funds shall maintain 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. A lawyer shall inform the client or third person that the interest accruing on this account, net of any allowable monthly service charges, will be paid to the Lawyer Trust Account Commission established by the supreme court.

**45.4(2) Exceptions to using pooled interest-bearing trust accounts.** All client or third person funds shall be deposited in an account specified in rule 45.4(1) unless they are deposited in:

a. A separate interest-bearing trust account for the particular third person, client, or client's matter on which the interest, net of any transaction costs, will be paid to the client or third person; or

b. A pooled interest-bearing trust account with subaccountings that will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client or third person.

**45.4(3) Accounts generating positive net earnings.** If the client's or the third person's funds could generate positive net earnings for the client or third person, the lawyer shall deposit the funds in an account described in rule 45.4(2). In determining whether the funds would generate positive net earnings, the lawyer shall consider the following factors:

a. The amount of the funds to be deposited;

b. The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c. The rates of interest or yield at the financial institution in which the funds are to be deposited;

d. 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;

e. The capability of financial institutions described in rule 45.3 to calculate and pay interest to individual clients; and

f. Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

**45.4(4) Directions to depository institutions.** As to accounts created under rule 45.4(1), a lawyer or law firm shall direct the depository institution:

*a.* To remit interest or dividends, net of any allowable monthly service charges, as computed in accordance with the depository institution's standard accounting practice, at least quarterly, to the Lawyer Trust Account Commission;

*b.* To transmit with each remittance to the Lawyer Trust Account Commission a copy of the depositor's statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the amount of allowable monthly service charges deducted, if any, and the account balance(s) for the period covered by the report; and

*c.* To report to the Client Security Commission in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds. In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors. In the case of instruments that are honored when presented against insufficient funds, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, and the amount of overdraft. If an instrument presented against insufficient funds is not honored, the report shall be made simultaneously with, and within the time provided by law for, any notice of dishonor. If the instrument is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

[Court Orders April 20, 2005, and July 1, 2005, effective July 1, 2005]

**Rule 45.5 Definition of "allowable monthly service charges."** For purposes of this chapter, "allowable monthly service charges" means the monthly fee customarily assessed by the institution against a depositor solely for the privilege of maintaining the type of account involved. Fees or charges assessed for transactions involving the account, such as fees for wire transfers, stop payment orders, or check printing, are a lawyer's or law firm's responsibility and may not be paid or deducted from interest or dividends otherwise payable to the Lawyer Trust Account Commission.

[Court Order April 20, 2005, effective July 1, 2005]

**Rule 45.6 Lawyer certification.** Every lawyer required to have a client trust account shall certify annually, in such form as the supreme court may prescribe, that the lawyer or the law firm maintains, on a current basis, records required by Iowa R. of Prof'l Conduct 32:1.15(a).

[Court Order April 20, 2005, effective July 1, 2005]

**Rule 45.7 Advance fee and expense payments.**

**45.7(1) Definition of advance fee payments.** Advance fee payments are payments for contemplated services that are made to the lawyer prior to the lawyer's having earned the fee.

**45.7(2) Definition of advance expense payments.** Advance expense payments are payments for contemplated expenses in connection with the lawyer's services that are made to the lawyer prior to the incurrence of the expense.

**45.7(3) Deposit and withdrawal.** A lawyer must deposit advance fee and expense payments from a client into the trust account and may withdraw such payments only as the fee is earned or the expense is incurred.

**45.7(4) Notification upon withdrawal of fee or expense.** A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The attorney must transmit such notice no later than the date of the withdrawal.

**45.7(5) When refundable.** Notwithstanding any contrary agreement between the lawyer and client, advance fee and expense payments are refundable to the client if the fee is not earned or the expense is not incurred.

[Court Order April 20, 2005, effective July 1, 2005]

**Rule 45.8 General retainer.**

**45.8(1) Definition.** A general retainer is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not a payment for the performance of services and is earned by the lawyer when paid.

**45.8(2) *Deposit.*** Because a general retainer is earned by the lawyer when paid, the retainer should not be deposited in the trust account.

[Court Order April 20, 2005, effective July 1, 2005]

**Rule 45.9 Special retainer.**

**45.9(1) *Definition.*** A special retainer is a fee that is charged for the performance of contemplated services rather than for the lawyer's availability. Such a fee is paid in advance of performance of those services.

**45.9(2) *Prohibition.*** A lawyer may not charge a nonrefundable special retainer or withdraw unearned fees.

[Court Order April 20, 2005, effective July 1, 2005]

**Rule 45.10 Flat fee.**

**45.10(1) *Definition.*** A flat fee is one that embraces all services that a lawyer is to perform, whether the work be relatively simple or complex.

**45.10(2) *When deposit required.*** If the client makes an advance payment of a flat fee prior to performance of the services, the lawyer must deposit the fee into the trust account.

**45.10(3) *Withdrawal of flat fee.*** A lawyer and client may agree as to when, how, and in what proportion the lawyer may withdraw funds from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees.

[Court Order April 20, 2005, effective July 1, 2005]

# **Lawyer Trust Accounts in Iowa**

As Revised February 2012

Paul H. Wieck II  
Office of Professional Regulation

## **Establishing an Account**

Need for a Trust Account:

Not every lawyer needs a trust account. The key issue is whether you accept funds of the kind that must be placed in a trust account. (See the discussion regarding required trust account deposits under “Operating the Account,” below.) Government attorneys or corporate counsel generally will not need to maintain a trust account. Most private practitioners will need to maintain a trust account. Iowa R. of Prof'l Conduct 32:1.15; Iowa Ct. R. 45.1.

What Kind of Trust Account is Required:

For most client funds, the appropriate account is the pooled, or IOLTA account, in which funds belonging to multiple clients or third parties are pooled in a single account. Interest earned on a pooled trust account (net of allowable service charges for that type of account) is paid by the depository institution to the Lawyer Trust Account Commission (LTAC). LTAC distributes grants annually as approved by the Iowa Supreme Court for legal services for low-income persons and law-related education. Iowa Ct. R. 45.4(1).

Court rules also authorize establishment of a separate interest-bearing account for an individual client or third party. When a separate interest-bearing account is established for an individual client or third party, the interest earned on the account (net of account costs) is payable to the client or third party for whom the account was established. Iowa Ct. R. 45.4(2)(a).

Court rules also authorize establishing a pooled trust account with subaccounting, wherein the interest owed to each individual client is computed and paid, net of pro rata account costs, to the individual client. These accounts seldom are used due to the administrative overhead associated with interest computation and the generally insignificant amount of interest actually payable to any particular client after deduction of costs. Iowa Ct. R. 45.4(2)(b).

In determining whether to deposit client or third-party funds into an IOLTA account or a separate account for the individual client, the lawyer must assess whether the funds to be invested could produce a positive net return for the client. Note that the key phrase “significant net return” no longer appears in the rule. The lawyer should consider the following factors:

The amount of the funds to be deposited

The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

The rates of interest or yield at the financial institution in which the funds are to be deposited;

The cost of establishing and administering the account, including service charges, and the cost of preparing any tax reports required for interest accruing to a client’s benefit;

The depository institution’s ability to calculate and pay interest to individual clients;

Any other circumstances that affect the ability of the client’s funds to earn a net return for the client.

Iowa Ct. R. 45.4(3).

**Tip:** This is not a one-time analysis. Every client balance in a pooled trust account should be considered in light of these factors on a recurring basis. An excellent time to consider this issue is incident to the monthly reconciliation of client balances with the trust account checkbook and bank statement.

What Institutions May Serve as Trust Account Depositories:

A bank, savings bank, trust company, savings and loan association, credit union, or federally regulated investment company may serve as a depository institution, provided the institution is authorized to do business in Iowa, and is FDIC/NCUSIF insured. However, trust monies may be deposited at credit unions only to the extent that each individual client’s funds are eligible for insurance. Iowa Ct. R. 45.3.

The trust account must be located in Iowa. Iowa Ct. R. 45.1.

Other factors the attorney should consider when selecting a depository institution:

Amount of deposit insurance available and likely client balances  
Institutional stability  
Convenience  
Bank interest rate and fees  
Return of cancelled checks or facsimiles thereof

## Deposit Insurance

So long as a trust account at a bank is properly titled (“trust account”) and the attorney maintains current records regarding the interest of each client (subaccount ledger cards), deposit insurance limits will be applied per client. If a trust account is located at a credit union, the foregoing requirements must be met, and in addition the client personally must qualify to be a depositor at the credit union, to qualify for deposit insurance.

The standard insurance amount is \$250,000 per depositor. The \$250,000 limit formerly was set to revert to \$100,000 per depositor on January 1, 2014, but now has been extended permanently by Congress.

In addition to, and separate from the standard coverage of \$250,000 per depositor, temporary unlimited coverage is provided for deposits in lawyer trust accounts under the Federal Deposit Insurance Act, as amended. All funds in IOLTA accounts are fully insured, without limit, from December 31, 2010 through December 31, 2012. Unlike the temporary coverage previously provided under the Transaction Account Guarantee Program (TAGP), banks are not allowed to opt out of the new temporary unlimited coverage.

## Nature of the Account to be Established:

The account agreement must allow withdrawals and transfers without delay whenever the deposited funds are required, subject only to any notice period the institution is required to impose by law or regulation. In practice, this means a checking account or the functional equivalent thereof. Iowa Ct. R. 45.3.

A lawyer trust account must include in the title of the account the word “Trust Account.” Iowa Ct. R. 45.1. This account identification is required to ensure coverage for each client’s monies under federal deposit insurance rules.

## Special Duty With Respect to Establishing an IOLTA Account:

The lawyer is responsible for directing the institution to perform the interest payment and reporting tasks required of IOLTA depositories no less often than quarterly. These tasks include remitting interest or dividends earned on the account, net of allowable service charges, to the Lawyer Trust Account Commission, along with a copy of the account statement. Iowa Ct. R. 45.4(4). If the allowable monthly service charge exceeds the IOLTA interest payable and the institution does not waive the excess, the law firm is responsible for paying the excess service charge. Charges associated with law firm activities with the account such as wire transfer fees or check printing charges may not be netted against IOLTA interest, and are a law firm responsibility also. Iowa Ct. R. 45.5. The Commission asks that depository institutions also prepare and send a summary report form with the statement. Copies of the report form and an instruction document for new IOLTA depository institutions are included in the forms portion of this outline.

Iowa Court Rule 45.4(4) allows a depository institution to collect an “allowable monthly service charge” from the interest earned on a pooled lawyer trust account. For purposes of chapter 45 of the Iowa Court Rules, “allowable monthly service charge” is defined as a monthly fee “customarily assessed by the institution against a depositor solely for the privilege of maintaining the type of account involved.” Approximately two-thirds of the banks and credit unions serving as depositories for trust accounts in Iowa do not assess a service charge on these accounts. Of those institutions that do assess a service charge, most simply assess a small flat monthly fee, which is considered permissible under the rule.

Recently, a few institutions have begun assessing an “activity-based” service charge, computed on the basis of account activity such as credit and debit transactions. These activity-based charges sometimes are assessed in addition to a flat minimum monthly service charge. Iowa Court Rule 45.5 provides that charges assessed for transactions involving the account are a lawyer or law firm responsibility, and may not be paid from interest or dividends otherwise payable to the Lawyer Trust Account Commission. Based on this rule, the Commission’s policy is that these activity-based charges may not be collected from interest due the Lawyer Trust Account Commission under the IOLTA (Interest on Lawyer Trust Account) program. If an institution chooses to assess these activity-based charges, and the lawyer or law firm continues to house the trust account at that institution, the lawyer or law firm is responsible for paying the activity-based charges.

The federal tax identification number for the Lawyer Trust Account Commission is 42-1245104. This number must be used in connection

with any IOLTA trust account established pursuant to Iowa Court Rule 45.4(1).

#### Overdraft Notification Program

With respect to any account established under Iowa Court Rule 45.4(1), the lawyer is required to direct the depository institution to report to the Client Security Commission any time an overdraft condition exists with respect to a lawyer trust account. This rule is modeled after a similar provision adopted in Minnesota in 1990. Forty-two states now have adopted a similar provision requiring that banks immediately notify the lawyer and the state disciplinary office whenever an overdraft occurs in a lawyer trust account. The experience in those states that have adopted such a rule is that early intervention following reporting of an overdraft helps prevent additional losses to clients that would occur absent a timely inquiry by the disciplinary authority. Iowa Ct. R. 45.4(c).

#### More than One Trust Account:

A lawyer or law firm may maintain more than one trust account. However, because a single IOLTA trust account can hold funds for multiple clients, most lawyers only need to maintain one IOLTA trust account. Multiple accounts create additional record-keeping overhead and increase the chance that mistakes will be made depositing and disbursing funds. Multiple trust accounts most often are used where circumstances dictate opening a trust account for an individual client under the provisions of Iowa Court Rule 45.4(2)(a) in addition to the IOLTA trust account normally maintained by the lawyer or firm.

#### Signature Authority on Trust Accounts:

Only a lawyer admitted to practice in Iowa or a person under the direct supervision of a lawyer may be an authorized signatory on a trust account. Iowa Ct. R. 45.2(3)(b). The Client Security Commission recommends that lawyers carefully evaluate whether non-lawyer staff members should be authorized to sign checks or authorize transfers. The personal responsibility and accountability for client funds is non-delegable, and the attorney will be personally responsible for any staff defalcation. If signature or transfer authority is delegated to non-lawyer staff, the Commission recommends procuring employee dishonesty insurance coverage.

### **Operating an Account**

#### Principles of Trust Account Operations:

Do not Commingle Your Own Funds in the Trust Account, except for the limited exception provided by Iowa Rule of Professional Conduct 32:1.15(b) and Iowa Court Rule 45.1(1).

Each Client's Funds in a Pooled Account Must Be Treated as a Separate Subaccount

A Client Can Only Spend His or Her Subaccount Monies

A Client Subaccount Never Should Show a Negative Balance

Only Make Disbursements from Known Good Funds

You Must Account to the Penny at All Times

The End Result for Any Client Subaccount Must be Zero

An Audit Trail is Essential

What Funds Must Be Deposited in the Trust Account:

All funds of clients, regardless of size, paid to a lawyer or law firm, including advances for costs and expenses and excluding only "general retainers" (a defined term), must be deposited in an interest-bearing trust account located in Iowa. Iowa R. Prof'l Conduct 32:1.15(a); Iowa Ct. R. 45.7(3), 45.9(1) and 45.10(2). The decision on where to place funds is based on ownership at the time the funds are received—not how quickly ownership will change from client to the lawyer. Common examples:

Any advance fee or retainer except a "general retainer." Iowa Ct. R. 45.7(7)(3)(advance fees and expenses), 45.9(1)(special retainers), and 45.10(2)(flat fees); *Board of Professional Ethics and Conduct v. Apland*, 577 N.W.2d 50 (Iowa 1998)

Advances from the client for costs and expenses

Settlement proceeds that include a portion that is the attorney's fee

Real estate loan proceeds prior to closing and disbursement

Funds from the sale of property belonging to the client

Funds and Property of Third Parties

The rules make clear that the obligation to safeguard and account extends to the property of third persons that comes into the lawyer's possession in the course of practice, in addition to client property. Iowa R. of Prof'l Conduct 32:1.15(a); Iowa Ct. R. 45.1.

#### Requirement to Inform Client or Third Party Regarding Effect of Deposit in IOLTA Trust Account

If the funds of a client or third person are deposited in a pooled account established under the provisions of Iowa Court Rule 45.4(1), the lawyer must inform the client or third person that interest accruing on the account, net of allowable monthly service charges, will be paid to the Lawyer Trust Account Commission under the IOLTA program described in chapter 45 of the Iowa Court Rules. Iowa Ct. R. 45.4(1). The rule does not require that this be done in writing.

**Tip:** Your law firm operating procedures should include this notice as a matter of course any time you accept monies from anyone—client or third party—that will be placed in your IOLTA account. Possible places you might put a written notice include your law firm brochure; your written fee agreements; the receipt or acknowledgement you give a client when you accept monies for deposit in the trust account. At a minimum, you probably will want to make it standard operating procedure to advise the clients verbally regarding the IOLTA program whenever you accept these kinds of funds.

#### What Funds May NOT Be Deposited in the Trust Account

No funds belonging to the lawyer or the law firm may be deposited in the trust account. Common examples of funds that should not be placed in the trust account include:

Fees already billed for and earned

Funds an attorney holds that are not related to the practice of law (e.g., the monies belonging to the county bar association for which the attorney is treasurer)

**Exception:** Funds reasonably sufficient to avoid or pay service charges may be deposited in the trust account. Iowa Ct. R. 45.1(1). Where a minimum balance requirement exists for the account, it is permissible to deposit funds sufficient to maintain the minimum balance. A separate subaccount ledger should be maintained for such deposits.

Exception: Funds belonging in part to a client and in part to the lawyer or law firm (presently or potentially) must be deposited in the trust account. This rule applies even if the funds will be disbursed to the parties entitled thereto on the same day they are received. However, the lawyer or law firm's portion must be withdrawn promptly when due, unless entitlement to that portion is disputed by the client. Disputed portions must remain in trust until the dispute is resolved. Iowa Ct. R. 45.1(2).

#### What Payments or Disbursements May be Made from the Trust Account:

No payments for personal or office expenses of the lawyer should be made from a trust account. If some portion of the money in a trust account belongs to the lawyer because it is his or her earned fee, the lawyer should write a check on the trust account payable to the lawyer, deposit it in the lawyer's regular business account and pay his or her expenses from the regular account.

Fees may and should be withdrawn as soon as they are earned and undisputed. An accounting to the client for the fees deemed earned should be provided the client no later than contemporaneously with the withdrawal for such fees or expenses. Iowa Ct. R. 45.7(4).

Costs or expenses incident to services performed may be paid based on agreement with the client. An accounting to the client for costs and expenses paid from the client's subaccount should be provided the client no later than contemporaneously with the withdrawal for such expenses. Iowa Ct. R. 45.7(4).

Disbursements requisite to closing of a real estate transaction or settlement of an injury claim may be made from the client subaccount. An accounting to the client for all the disbursements should be provided to and approved by the client incident to the disbursements.

If two or more parties dispute entitlement to funds held by a lawyer in trust, the lawyer should retain those funds in trust until such time as the dispute is resolved. Iowa R. of Prof'l Conduct 32:1.15(e). The disputed funds should be placed in an account that will bear interest for the benefit of the parties if the considerations of Iowa Court Rule 45.4(3) indicate the funds could generate positive net earnings for the parties ultimately found entitled to the funds.

#### When Disbursements May be Made Based on a Deposit

Every deposit to a lawyer trust account must be allowed to clear through the banking process before disbursement is made based on that deposit. If this procedure is not observed, the likely eventual result will be

wrongful disbursement of other clients' funds when a check or draft deposited to the trust account is dishonored.

Cash deposits and verified electronic transfers are reliable enough to support same day disbursement. Bank certified checks are reliable enough to support same day disbursement provided authenticity of the check is known to the lawyer or verified with the issuing bank. If authenticity is not known to the lawyer, verification should be sought from the issuing bank.

Cashier's checks, personalized checks and drafts should be allowed to clear completely through the issuing institution. Your own bank institution can provide guidance regarding normal clearance times and can verify clearance of individual instruments at the issuing bank.

Lawyers should be especially cautious regarding checks drawn on out-of-state or foreign banks, including certified checks and cashier's checks drawn on such institutions. In recent years, the number of counterfeit or fraudulent checks presented to Iowa lawyers has increased. Clearance times, particularly for checks drawn on foreign banks, are quite long. Con artists often provide one counterfeit or fraudulent check drawn on a foreign (even Canadian) bank, and then follow it up with another more substantial check drawn on the same bank when the first check *appears* to have been honored due to the long clearance times on checks drawn on foreign banks.

If a same-day closing or settlement is desired, the best solution generally will be to require that the deposit to your trust account be made by wire transfer or bank certified check.

#### Handling of Retainers and Advances for Fees and Expenses

In *Board of Professional Ethics and Conduct v. Apland*, 577 N.W.2d 50 (Iowa 1998) the Court ruled that all advance fee payments must be placed in the client trust account until earned. The Court also characterized so-called flat fees and special retainers as advance fees, and stated that they also must be placed and held in trust until earned. The Court distinguished a true general retainer, in which the consideration is paid in exchange for a commitment of future availability to provide services, as earned at the time it is paid.

The *Apland* requirements regarding handling of advance fees, general retainers, special retainers and flat fees now are specifically set out in Iowa Court Rules 45.7 through 45.10. The requirement for trust account deposit specifically applies to advances for expenses as well as any kind of advance fee. Iowa Ct. R. 45.7(2).

When a lawyer withdraws funds from the trust account to pay earned fees or expenses, the client must be provided written notice of the time, amount and purpose of the withdrawal, along with a complete accounting. This notice and accounting must be transmitted no later than the date the withdrawal is made. Iowa Ct. R. 45.7(4).

**Tip:** It appears these rules dictate that a law firm handle advances for fees and expenses one of two ways. The first, and most cumbersome way, is to place the funds in your trust account, open a client subaccount ledger card, and then send the client an accounting every time you make a deduction for fees or expenses. The second, and less cumbersome way, is to place the funds in your trust account, open a client subaccount ledger card, and then include the fees and expenses owed by the client in your periodic billing cycle, with your statement showing the amounts owed for fees and advanced expenses, and the amount you intend to deduct from the client's trust account balance.

#### What You Must Not Do:

You must not deposit advances for unearned fees or advances for expenses in your business account.

You must not pay anything from a client's monies in your trust account until you provide notice and accounting for the deduction or payment.

#### Conflicting Claims to Funds in Trust

If a lawyer has possession of funds or other property to which there are conflicting claims, the property should be separately maintained until the dispute is resolved. Iowa R. of Prof'l Conduct 32:1.15(e). This may include third party claims against client funds in the trust account. If the third party claims are not frivolous, the lawyer must refuse to surrender the property to the client until the claims are resolved. Iowa R. of Prof'l Conduct 32:1.15, comment [5].

#### What Books and Records Must be Maintained

Every lawyer engaged in private practice of law must maintain books and records sufficient to demonstrate compliance with Iowa Rule of Professional Conduct 32:1.15(a). Books and records relating to funds or property of clients are to be maintained for at least six years after termination of the representation to which they relate. Iowa Ct. R. 45.2(3). A certification regarding this responsibility is included in the annual report filed with the Client Security Commission each year. Iowa Ct. R.

45.6. Upon dissolution of a firm or practice or sale of a firm or practice, arrangements must be made for maintenance of the books and records for the required six year period. Iowa Ct. R. 45.2(3)(d), (e).

#### Implementation of the Record Keeping Duty

Effective February 20, 2012, Iowa Court Rule 45.2 was amended to describe in detail the financial records a lawyer must maintain for a client trust account. Records required by the rule may be maintained by electronic, photographic, computer, or other media, so long as they otherwise comply with the rules and that printed copies can be produced. Iowa Ct. R 45.2(3)(c).

For each account maintained, records should identify the name of the depository, account number, account name, and date the account was opened. The records should also show the type of each such account, whether pooled with net interest paid to the Lawyers Trust Account Commission (IOLTA account), pooled with allocation of interest, or individual, including the client name. In addition to this basic record for each account, the following records must be maintained:

Receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

Ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

Copies of retainer and compensation agreements with clients as required by Iowa R. of Prof'l Conduct 32:1.5;

Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

Copies of bills for legal fees and expenses rendered to clients;

Copies of records showing disbursements on behalf of clients;

The physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

Records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient, and the trust account name or number from which money is withdrawn;

Copies of monthly trial balances and monthly reconciliations of the client trust accounts maintained by the lawyer, and

Copies of those portions of client files that are reasonably related to client trust account transactions.

A record showing all property, specifically identified, other than cash, held in trust from time to time for clients or others. Routine files, documents and items such as real estate abstracts that are not expected to be held indefinitely need not be so recorded but should be documented in the files of the lawyer as to receipt and delivery. A suggested form for recording property held in trust is included in the forms portion of this outline.

#### Use of Computer Accounting Systems

Lawyers or law firms may use computer systems to maintain trust account records. A number of functional software programs are available for this purpose. For an example of guidelines for use of a general accounting software program, and information regarding just a few of the many trust-account specific software modules available, see the following web pages:

[http://lprb.mncourts.gov/LawyerResources/TADocuments/MaintainingTrustAccountsUsingQuicken\(2006\).pdf](http://lprb.mncourts.gov/LawyerResources/TADocuments/MaintainingTrustAccountsUsingQuicken(2006).pdf)

<http://www.lsba.org/2007Solo/ClientTrustAcc.doc>

<http://law.lexisnexis.com/back-office-pclaw>

<http://www.easysoft-usa.com>

<http://www.abacuslaw.com/products/trustaccounting.html>

<http://www.tabs3.com>

<http://www.lawyertrustaccount.com>

<http://www.esilaw.com>

An attorney who maintains trust account records by computer should print and retain, on a monthly basis, the checkbook register, the balances of the subaccount ledgers, and the reconciliation report. Electronic records should be regularly backed up by an appropriate storage device. The frequency of the back up procedure should be directly related to the volume of activity in the trust account.

#### Accounting to the Client

The lawyer must render appropriate accounts to the client regarding all funds, securities and other properties of a client coming into the possession of the lawyer. Iowa Ct. R. 45.2(2). Prompt payment or delivery must be made to the client of all such items the client is entitled to when the client so requests. Iowa Ct. R. 45.2(2).

Simply stated: When clients ask you how much money you're holding for them or what you've done with the money while you've had it, you must tell them. You must advise the client every time something is added to the client's subaccount, and every time something is taken from the client subaccount.

#### Client Payments By Credit Card

Three key issues must be addressed if you want to accept credit card payments of retainers or billed fees. First, you must address the surcharge imposed by the credit card company, which you are not allowed to pass along to the client. The full face value of a retainer or payment against an outstanding bill paid by credit card must be credited to the client. The authority provided by Iowa Court Rule 45.1(1) may be used to establish a law firm subaccount with a small, periodically refreshed balance, within the trust account, to pay the service charges associated with retainers paid by credit card. A better alternative, if the credit card issuer is willing, is to assess the service charges against the law firm's general business account.

Second, you must be careful not to make disbursements based on a credit card deposit in your trust account until there is no possibility the charges can be reversed. Normally there is an initial delay until the bank actually credits a credit card payment to the trust account, and there is a further period during which the client may object and reverse the charge on the card. You should ascertain from the credit card issuer how quickly it actually credits such deposits, and when these deposits become ineligible for charge back by the credit card holder. Once again, you may be able to arrange with your credit card issuer for charge-backs to be made against your firm operating account rather than your trust account.

Third, if you will be accepting credit card payments of both retainers and earned fees, and you only want to set up one account to accept the credit card payments, you should set up your trust account to accept the credit card payments, rather than your operating account. Put all credit card payments in your trust account, and keep the retainers there until earned and the contingencies have passed. Keep the earned fee payments there until the contingencies have passed, and then transfer them over to your business account for disbursement.

What Should be Done with Funds Owed a Client Who No Longer Can be Located? (“Stale Funds Procedure”)

A lawyer or law firm must exercise due diligence to locate and communicate with the client or clients to whom stale or excess funds might rightfully belong. What constitutes reasonable due diligence will vary depending on the amount of the funds involved. Reasonable efforts might include, for example, corresponding with possible owners by mail, searching for possible owner addresses through the Social Security Administration if you have a Social Security Number for them, or employing one of the firms that conducts searches for heirs.

If it is impossible to make proper disposition of the monies to the client using the steps outlined above, then the monies should be considered potentially subject to the provisions of Iowa Code section 556.7. If the time period specified in section 556.7 has not passed, the monies may be deposited in a separate, interest-bearing account under the provisions of Iowa Court Rule 45.4(2)(a). If the time period specified in section 556.7 has passed, or when the time period specified in section 556.7 does pass, the lawyer or firm then may follow the procedures specified in Iowa Code sections 556.11 and 556.13, regarding notice and tender of the monies to the Treasurer of the State of Iowa.

## **Closing an Account**

### Moving Your Trust Account to a New Depository Institution

A lawyer is not required to notify anyone before transferring a trust account to a new depository institution. However, care should be taken to ensure that all outstanding checks on the existing trust account are accounted for, and that interest owed the Lawyer Trust Account Commission will be properly disbursed by the institution. Moving a trust account likely will result in a change in information previously reported to the Client Security Commission, and will warrant an interim report to the commission within thirty days after the change.

### Closing the Trust Account

Once again, a lawyer is not required to notify anyone before closing a trust and leaving practice. However, here also care should be taken to ensure that all outstanding checks on the trust account are accounted for, and that interest owed the Lawyer Trust Account Commission will be properly disbursed by the institution. All monies owed clients must be returned to the clients entitled thereto so that no remaining client monies exist in the trust account. If a particular client cannot be found, it may be necessary to complete the “stale funds” procedure before closing the account. Closing a trust account likely will result in a change in information previously reported to the Client Security Commission, and will warrant an interim report to the commission within thirty days after the change.

### **Audit Program, Client Security Commission**

The director of the Office of Professional Regulation is responsible for conducting audits and investigations of attorneys’ accounts and office procedures to determine compliance with Iowa Rule of Professional Conduct 32:1.15 and chapter 45 of the Iowa Court Rules. Iowa Ct. R. 39.2(3)(c). Attorneys are required to cooperate fully with these audits and investigations as a continuing condition of their license to practice. Iowa Ct. R. 39.10, 39.12.

The director is assisted in the performance of audits and investigations by part-time trust account auditors. The general goal of the Commission is to conduct an unannounced periodic audit of each lawyer trust account in Iowa no less than every three to four years. Special audits or investigations are conducted on an as-needed basis. Possible causes for special audits include claims against the Client Security Trust Fund, unexplained overdrafts of trust accounts, and some types of ethics complaints.

### **Common Issues**

**Improper Handling of Retainers:** The Court has specified how retainers of various kinds must be handled in Iowa. Virtually all the commonly used variants of the retainer initially must be placed in the trust account.

**Failure to Take Fees when Warranted:** Lawyers are responsible for removing fees from retainers placed in the trust account on a timely basis when they are earned. An accounting should be provided the client no later than the time when the earned fee is withdrawn from the retainer. Failure to remove earned fees on a timely basis constitutes commingling,

and over time can be the cause of unexplained excess funds in a trust account.

**Outstanding Checks:** Frequently clients or other payees will fail to promptly negotiate checks drawn on the trust account. The lawyer or law firm should have an established procedure for periodically following up on these outstanding checks, to clear them from the end of month reconciliations and aid in placing client subaccounts in zero status when warranted.

**“Unintentional” Overdrafts:** Overdrafts carry considerable risk of inadvertently using funds in one client’s subaccount to subsidize operations with respect to another client’s subaccount. Common causes of overdraft situations include failure to make trust account deposits in a timely manner; failure to ensure that a deposited check clears the bank upon which it is drawn before issuing trust account checks based on it; asking clients to “wait until tomorrow” to cash a settlement check.

Contact Information:

Mail: Office of Professional Regulation, Iowa Judicial Branch Building,  
1111 E. Court Avenue, Des Moines, Iowa 50319  
Telephone: (515) 725-8029 Voice, (515) 725-8032 Facsimile  
E-Mail: [client.security@iowacourts.gov](mailto:client.security@iowacourts.gov)  
WebSite:  
[http://www.iowacourts.gov/Professional\\_Regulation/Attorney\\_Regulation  
Commissions/Client\\_Security/](http://www.iowacourts.gov/Professional_Regulation/Attorney_Regulation_Commissions/Client_Security/)

## References

Grateful acknowledgement is made of the following resources, from which principles, concepts, tips and narrative have been readily adapted in the foregoing outline. Particular credit is noted for Opinion Number 9 of the Minnesota Lawyers Professional Responsibility Board, now appearing at Appendix 1 of the Minnesota Rules of Professional Conduct, which substantially provides the analysis regarding record keeping duties.

Appendix 1, Minnesota Rules of Professional Conduct (Maintenance of Books and Records);  
[http://lprb.mncourts.gov/LawyerResources/TADocuments/Appendix\\_1\\_to\\_MN\\_Rules\\_of\\_Prof.\\_Conduct\\_re\\_Books\\_and\\_Records.pdf](http://lprb.mncourts.gov/LawyerResources/TADocuments/Appendix_1_to_MN_Rules_of_Prof._Conduct_re_Books_and_Records.pdf)

The ABA Guide to Lawyer Trust Accounts, Jay G. Foonberg (ABA Section of Law Practice Management, 1996)

Trust Accounts – Everything You Ever Wanted to Know but Were Afraid To Ask (Minnesota State Bar Association Continuing Legal Education, April 2002)

Client Trust Accounting for Delaware Attorneys (Lawyers’ Fund for Client Protection of the State Bar of Delaware, November 23, 1998),  
<http://courts.delaware.gov/lfcg/publications.htm>

Illinois Client Trust Account Handbook (Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, July 2011),  
<http://www.iardc.org/toc.html>

Temporary Unlimited Coverage for Non-Interest Bearing Transaction Accounts (but specifically including IOLTA accounts),  
<http://www.fdic.gov/deposit/deposits/insured/temporary.html>

## CHAPTER 32 IOWA RULES OF PROFESSIONAL CONDUCT

### *PREAMBLE AND SCOPE*

Rule 32:1.0           TERMINOLOGY

### *CLIENT-LAWYER RELATIONSHIP*

Rule 32:1.1           COMPETENCE  
 Rule 32:1.2           SCOPE OF REPRESENTATION AND ALLOCATION OF  
                           AUTHORITY BETWEEN CLIENT AND LAWYER  
 Rule 32:1.3           DILIGENCE  
 Rule 32:1.4           COMMUNICATION  
 Rule 32:1.5           FEES  
 Rule 32:1.6           CONFIDENTIALITY OF INFORMATION  
 Rule 32:1.7           CONFLICT OF INTEREST: CURRENT CLIENTS  
 Rule 32:1.8           CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES  
 Rule 32:1.9           DUTIES TO FORMER CLIENTS  
 Rule 32:1.10          IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE  
 Rule 32:1.11          SPECIAL CONFLICTS OF INTEREST FOR FORMER AND  
                           CURRENT GOVERNMENT OFFICERS AND EMPLOYEES  
 Rule 32:1.12          FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER  
                           THIRD-PARTY NEUTRAL  
 Rule 32:1.13          ORGANIZATION AS CLIENT  
 Rule 32:1.14          CLIENT WITH DIMINISHED CAPACITY  
 Rule 32:1.15          SAFEKEEPING PROPERTY  
 Rule 32:1.16          DECLINING OR TERMINATING REPRESENTATION  
 Rule 32:1.17          SALE OF LAW PRACTICE  
 Rule 32:1.18          DUTIES TO A PROSPECTIVE CLIENT

### *COUNSELOR*

Rule 32:2.1           ADVISOR  
 Rule 32:2.2           (REERVED)  
 Rule 32:2.3           EVALUATION FOR USE BY THIRD PERSONS  
 Rule 32:2.4           LAWYER SERVING AS THIRD-PARTY NEUTRAL

### *ADVOCATE*

Rule 32:3.1           MERITORIOUS CLAIMS AND CONTENTIONS  
 Rule 32:3.2           EXPEDITING LITIGATION  
 Rule 32:3.3           CANDOR TOWARD THE TRIBUNAL  
 Rule 32:3.4           FAIRNESS TO OPPOSING PARTY AND COUNSEL  
 Rule 32:3.5           IMPARTIALITY AND DECORUM OF THE TRIBUNAL  
 Rule 32:3.6           TRIAL PUBLICITY  
 Rule 32:3.7           LAWYER AS WITNESS  
 Rule 32:3.8           SPECIAL RESPONSIBILITIES OF A PROSECUTOR  
 Rule 32:3.9           ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

### *TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS*

Rule 32:4.1           TRUTHFULNESS IN STATEMENTS TO OTHERS  
 Rule 32:4.2           COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL  
 Rule 32:4.3           DEALING WITH UNREPRESENTED PERSON  
 Rule 32:4.4           RESPECT FOR RIGHTS OF THIRD PERSONS

### *LAW FIRMS AND ASSOCIATIONS*

Rule 32:5.1           RESPONSIBILITIES OF PARTNERS, MANAGERS, AND  
                           SUPERVISORY LAWYERS  
 Rule 32:5.2           RESPONSIBILITIES OF A SUBORDINATE LAWYER

Rule 32:5.3	RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS
Rule 32:5.4	PROFESSIONAL INDEPENDENCE OF A LAWYER
Rule 32:5.5	UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW
Rule 32:5.6	RESTRICTIONS ON RIGHT TO PRACTICE
Rule 32:5.7	RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

*PUBLIC SERVICE*

Rule 32:6.1	VOLUNTARY PRO BONO PUBLICO SERVICE
Rule 32:6.2	ACCEPTING APPOINTMENTS
Rule 32:6.3	MEMBERSHIP IN LEGAL SERVICES ORGANIZATION
Rule 32:6.4	LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS
Rule 32:6.5	NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

*INFORMATION ABOUT LEGAL SERVICES*

Rule 32:7.1	COMMUNICATIONS CONCERNING A LAWYER'S SERVICES
Rule 32:7.2	ADVERTISING
Rule 32:7.3	DIRECT CONTACT WITH PROSPECTIVE CLIENTS
Rule 32:7.4	COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION
Rule 32:7.5	PROFESSIONAL NOTICES, LETTERHEADS, OFFICES, AND SIGNS
Rule 32:7.6	POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES
Rule 32:7.7	RECOMMENDATION OF PROFESSIONAL EMPLOYMENT
Rule 32:7.8	SUGGESTION OF NEED OF LEGAL SERVICES

*MAINTAINING THE INTEGRITY OF THE PROFESSION*

Rule 32:8.1	BAR ADMISSION AND DISCIPLINARY MATTERS
Rule 32:8.2	JUDICIAL AND LEGAL OFFICIALS
Rule 32:8.3	REPORTING PROFESSIONAL MISCONDUCT
Rule 32:8.4	MISCONDUCT
Rule 32:8.5	DISCIPLINARY AUTHORITY; CHOICE OF LAW

*Emergency Legal Assistance*

[9] In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

[Court Order April 20, 2005, effective July 1, 2005]

**Rule 32:1.15: SAFEKEEPING PROPERTY**

**(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.**

**(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.**

**(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.**

**(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.**

**(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.**

**(f) All client trust accounts shall be governed by chapter 45 of the Iowa Court Rules.**

**Comment**

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. *See*, Iowa Ct. R. ch 45.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that

account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party; but when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Such a fund has been established in Iowa, and lawyer participation is mandatory to the extent required by chapter 39 of the Iowa Court Rules.

[Court Order April 20, 2005, effective July 1, 2005]

#### **Rule 32:1.16: DECLINING OR TERMINATING REPRESENTATION**

**(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:**

**(1) the representation will result in violation of the Iowa Rules of Professional Conduct or other law;**

**(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or**

**(3) the lawyer is discharged.**

**(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:**

**(1) withdrawal can be accomplished without material adverse effect on the interests of the client;**

**(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;**

**(3) the client has used the lawyer's services to perpetrate a crime or fraud;**

**(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;**

**(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;**

**(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or**

**(7) other good cause for withdrawal exists.**

**(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.**

**(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.**

### Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under rule 32:1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

[Court Order April 20, 2005, effective July 1, 2005]

### **Rule 32:5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

**With respect to a nonlawyer employed or retained by or associated with a lawyer:**

**(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;**

**(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and**

**(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Iowa Rules of Professional Conduct if engaged in by a lawyer if:**

**(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**

**(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

### Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Iowa Rules of Professional Conduct. See comment [1] to rule 32:5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Iowa Rules of Professional Conduct if engaged in by a lawyer.

[Court Order April 20, 2005, effective July 1, 2005]

## CHAPTER 45

### CLIENT TRUST ACCOUNT RULES

Rule 45.1	Requirement for client trust account
Rule 45.2	Action required upon receiving funds, <u>accounting, and records</u>
Rule 45.3	Type of accounts and institutions where trust accounts must be established
Rule 45.4	Pooled interest-bearing trust account
Rule 45.5	Definition of “allowable monthly service charges”
Rule 45.6	Lawyer certification
Rule 45.7	Advance fee and expense payments
Rule 45.8	General retainer
Rule 45.9	Special retainer
Rule 45.10	Flat fee

#### **Rule 45.2 Action required upon receiving funds, accounting and records.**

**45.2(1)** *Authority to endorse or sign client’s name.* Upon receipt of funds or other property in which a client or third person has an interest, a lawyer shall not endorse or sign the client’s name on any check, draft, security, or evidence of encumbrance or transfer of ownership of realty or personalty, or any other document without the client’s prior express authority. A lawyer signing an instrument in a representative capacity shall so indicate by initials or signature.

**45.2(2)** ~~*Maintaining records, providing Aaccounting, and returning funds or property.*~~ A lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the lawyer’s possession and regularly account to the client for them. Except as stated in this chapter or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and shall promptly render a full accounting regarding such property. ~~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.~~

**45.2(3)** *Maintaining records.*

a. A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these rules and required by Iowa R. of Prof’l Conduct 32:1.15, and shall retain the following records for a period of six years after termination of the representation:

- (1) receipt and disbursement journals containing a record of deposits

to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(2) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(3) copies of retainer and compensation agreements with clients as required by Iowa R. of Prof'l Conduct 32:1.5;

(4) copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(5) copies of bills for legal fees and expenses rendered to clients;

(6) copies of records showing disbursements on behalf of clients;

(7) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(8) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient, and the trust account name or number from which money is withdrawn;

(9) copies of monthly trial balances and monthly reconciliations of the client trust accounts maintained by the lawyer, and

(10) copies of those portions of client files that are reasonably related to client trust account transactions.

b. With respect to trust accounts required by Iowa R. of Prof'l Conduct 32:1.15:

(1) only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account;

(2) receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and

(3) withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized bank transfer.

c. Records required by this rule may be maintained by electronic, photographic, computer, or other media provided that they otherwise comply with these rules and that printed copies can be produced. These records shall be accessible to the lawyer.

d. Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of the records specified in this rule.

e. Upon the sale of a law practice, the seller shall make appropriate arrangements for the maintenance of the records specified in this rule.

**Amendments to Division III of the Iowa Court Rules  
February, 2012  
Summary of Amendments to Chapter 45**

**Iowa Court Rule 45.2**

Iowa Court Rule 45.2 is amended to incorporate the general recordkeeping and electronic records provisions of the ABA Model Rules for Client Trust Account Records, adopted by the ABA on August 9, 2010. The amendment also reflects informal guidance the Iowa Client Security Commission has provided lawyers during audits and seminars for several years regarding their recordkeeping obligation. Until now, however, specific guidance regarding required recordkeeping has not been included in the Iowa rules. The amendment leaves intact the provisions of Iowa Court Rules 45.7 through 45.10, which generally incorporate the court's guidance regarding advances for fees and costs first set out in *Board of Professional Ethics & Conduct v. Apland*, 577 N.W.2d 50 (Iowa 1998).

**Iowa Court Rule 45.2(3)(a)**

The amended Iowa Court Rule 45.2(3)(a) lists the financial records a lawyer must maintain with regard to the trust accounts of a law firm. These include the master check book and client subaccount ledgers, and the supporting records that are necessary to safeguard and account for the receipt and disbursement of client funds as required by Iowa Rule of Professional Conduct 32:1.15. The model rule adopted by the ABA requires that lawyers maintain client trust account records for a period of five years after termination of each particular legal engagement or representation. The current Iowa rule provides for a six year retention period, and the Iowa amendment retains the current six year Iowa requirement.

The model rule adopted by the ABA provides for monthly trial balances and quarterly reconciliations of client trust accounts. Long-standing guidance by the Iowa Supreme Court Client Security Commission calls for monthly trial balances and monthly reconciliations, because the Commission's experience is that failure to perform trial balances and reconciliations of client subaccounts on a monthly basis is a key contributor to loss of accountability for client monies. The Iowa amendment therefore requires monthly trial balances and monthly reconciliations of client subaccounts. The amendment provides guidance regarding substitute checks or their equivalents, and records of electronic transfers, necessary given recent changes in banking methods. Auditors and other staff at the Client Security Commission routinely receive questions regarding the impact and record requirements of electronic banking methods, and the current rules provide little guidance.

### **Iowa Court Rule 45.2(3)(b)**

Iowa Court Rule 45.2(3)(b) is adopted to specify that only a lawyer admitted to the practice of law in Iowa or a person who is under the direct supervision of the lawyer may be an authorized signatory or authorize electronic transfers from a client trust account. The current Iowa rules do not restrict signature authority to lawyers. Some Iowa firms do delegate signature authority to non-lawyer staff. Iowa firms can limit their exposure to employee conversion by purchasing an employee dishonesty rider to their firm casualty insurance policy. The Iowa rule will not restrict the flexibility of those firms who believe they have trustworthy staff and are willing to accept and address the risk associated with staff signature authority.

### **Iowa Court Rule 45.2(3)(c)**

Iowa Court Rule 45.2(3)(c) is adopted to allow maintenance of trust account records in electronic, photographic, computer, or other media, provided the records comply with other trust account record requirements and can be produced in paper form when necessary. The Client Security Commission will continue to recommend that if trust account records are computerized, regular back-up copies of the records must be created.

### **Iowa Court Rules 45.2(3)(d) and (e)**

Iowa Court Rules 45.2(3)(d) and (e) are adopted to require that a lawyer's trust account records be maintained even in the event of dissolution or sale of a law practice.