

PROGRAM

- 8:00 a.m. to 8:30 a.m. **Registration**
- 8:30 a.m. to 8:45 a.m. **Odds and Ends**
Nick Drees, Federal Public Defender
- 8:45 a.m. to 9:15 a.m. **CJA Administration - FAQ's**
Nick Drees, Federal Public Defender
Abby Reinap, Panel Administrator
Nancy Lanoue, Assistant Panel Administrator
- 9:15 a.m. to 10:30 a.m. **Forensic Issues in Meth Cases**
Gene Gietzen
Forensic Consulting Associates, L.L.C.
- 10:30 a.m. to 10:45 a.m. **Break**
- 10:45 a.m. to 11:45 a.m. **Supreme Court & Eighth Circuit Update**
John Messina, Research & Writing Attorney
- 11:45 a.m. to 1:00 p.m. **Lunch (On your own)**
- 1:00 p.m. to 2:00 p.m. **Defense of Child Pornography Cases**
Wally Taylor; Anne Laverty; Steve Swift
Attorneys, Cedar Rapids, Iowa
- 2:00 p.m. to 3:00 p.m. **Use of Polygraphs**
Jane Kelly
Assistant Federal Public Defender, Cedar Rapids, Iowa
Tina Debban
Investigator, FPDO, Cedar Rapids, Iowa
- 3:00 p.m. to 3:15 p.m. **Break**
- 3:15 p.m. to 4:15 p.m. **Ethics**
Keith Rigg
Attorney, Des Moines, Iowa

NICK DREES

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

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

GENE GIETZEN

EDUCATION: B.S., University of Missouri (1974)

PROFESSIONAL: Forensic Scientist, Forensic Consulting, Springfield, Missouri (1992-Present); Laboratory Director (1982-1991); Serologist, Springfield, Missouri, Police Laboratory 1980-1982); Police Officer (1977-1980); Chemist, Independence, Missouri, Police Department (1974-1979)

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 Defender's Office (1996-2001 and 1984-1988); Assistant Attorney General in the Criminal Appeals and Research Division (1980-1984)

ANNE LAVERTY

EDUCATION: J.D., University of Iowa (1991); B.A., University of Iowa (1987)

PROFESSIONAL: Private practice since 1991 to present.

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)

KEITH RIGG

EDUCATION: J.D. with honors, Drake University (1982); B.S., with honors, Illinois State University (1979); Recipient, American Jurisprudence Awards in Remedies and Civil Procedure, 1979-1980.

PROFESSIONAL: Private Practice. First Assistant County Attorney, Woodbury County, Iowa, 1987-1988. First Assistant Public Defender, Woodbury County, Iowa, 1985-1986.

TINA DEBBAN

EDUCATION: B.S. Upper Iowa University, Public Administration (1997)

PROFESSIONAL: Certification: Arizona School of Polygraph Science, 1998

Tina Marie Debban
Federal Public Defender's Office
320 3rd St SE
Cedar Rapids, Iowa 52401
Work: (319) 363-9540

Work Experience:

5/04-Present Federal Public Defenders Office, Northern and Southern Districts of Iowa
Cedar Rapids Office
Investigator
Polygraph Examiner

Currently responsible for follow up investigation of assigned cases. General areas of responsibility include obtaining and verifying documents and evidence, interviewing clients and witnesses, reporting findings, and assisting attorneys in trial and sentencing preparation. Conduct polygraph examinations as needed at the request of FPD Attorneys.

5/86-5/2004 Cedar Rapids, Iowa Police Department
Police Officer

2/03-5/04 Cedar Rapids, Iowa Police Department
Investigative Division Lieutenant
Polygraph Examiner

Was assigned as the night shift commander in charge of the Investigative division. Responsible for the supervision of investigative personnel in the performance of their duties. Assigned and supervised cases ranging from misdemeanors to felonies. Specific duties also included direct supervision of the sex crimes unit, assistant news media liaison and was in charge of department polygraph unit.

Received training and certification from the Arizona School of Polygraph Science. Completed the ten week, 360 hour basic course in Psycho physiological Detection of Deception on March 12, 1998. The Arizona School of Polygraph Science is accredited by the American Polygraph Association. Following graduation, conducted criminal specific and Law Enforcement pre-employment examinations. Prepared reports as needed for hiring process and/or criminal investigation/prosecution. Completed between 250-300 examinations. Familiar in the use of both the analog and Lafayette Computerized Polygraph instrument. Was extensively involved in the employment process of Police Officer recruits to include polygraph, background investigations, and other testing.

2/01-2/03 Cedar Rapids, Iowa Police Department
Uniform Patrol Sergeant

Assigned to a "platoon" regime within the department, responsible for the supervision of uniformed officers in the performance of their duties as they conduct routine patrol, respond to emergency and non-emergency incidents, and other duties as assigned. Duties included organization and implementation of special projects to include alcohol/tobacco stings, hotel/motel drug interdiction, and traffic enforcement. Responsible for key decisions made in an effective and timely manner when situations needed resolution on the patrol beat. Monitors subordinates activities, assesses and evaluates their performance and productivity, subsequently administering discipline or positive reinforcement when acceptable and necessary. Conducted polygraph examinations when needed.

1990-12/00- Cedar Rapids, Iowa Police Department
Police Detective

One year experience investigating juvenile crimes to include misdemeanor and felony cases. Over nine years experience conducting sex crimes investigations to include adult sexual assault, child sexual abuse, miscellaneous related sex crimes and major child physical abuse. In this capacity have worked on a multi-disciplinary team aimed at the successful conclusion of child abuse cases. Have been involved in approximately eight homicide investigations working with lead detectives. Duties as a detective have included supervision of investigators, uniform officers and crime scene areas as needed. Have worked with State and Federal officials as cases are resolved through the Judicial system. Conducted polygraphs when needed.

4/87-3/90- Cedar Rapids, Iowa Police Department
Patrol Officer

General police duties as assigned to include identifying criminal activity within a designated area. Proactive and reactive response to criminal activity which involve the handling of incidents without arrest, effecting arrest when necessary, preliminary investigation including proper handling of evidence and crime scenes. All other duties include taking incident reports, traffic enforcement, initial follow-up on incidents, as well as eventual appearance in criminal and /or civil court as a witness.

8/86-4/87- Cedar Rapids, Iowa Police Department
Undercover narcotics officer

Worked in an undercover position in order to identify and investigate illegal drug activity subsequently building solid cases aimed at successful arrest and prosecution of these crimes.

1989-2004 ADM Cornsweetners, Cedar Rapids, IA

Work in main guard shack (in an off-duty CRPD officer capacity) as security with duties assigned by ADM. Responsible for plant security, organization and distribution of product paperwork, monitoring activity of semi tractor/tailors within the plant, as well as plant employees.

Education:

1984-1986 Hawkeye Community College-Waterloo, IA
AAA in Police Science 3.6 GPA
1996-1997 Upper Iowa University-Fayette, IA
BS in Public Administration 3.7gpa
1/98-1/98 Arizona School of Polygraph Science-Phoenix, AR
Polygraph Examiner Certification

Professional Affiliations:

Iowa Sex Crimes Investigators Association-Former Board Member & Co-Chair. No longer active
Iowa Polygraph Association Member
NDIA, member since 2006

Certifications:

Polygraph Examiner: Arizona School of Polygraph Science
Police Officer: Iowa Law Enforcement Academy (May-August, 1986)(No Longer active).

Additional Training:

8/04-8/15/86: Cedar Rapids, IA, DEA Drug School-80 hrs.
11/04-11/07/91: Middleton, WI, Child Sexual Abuse & Incest-32 hrs.
2/24-2/27/92: Des Moines, Ia, Sex Crimes Investigators Seminar-32 hrs.
5/18-5/24/92: Washington, DC-National Symposium on Child Victimization-40 hrs.
9/15-17-92: Des Moines, Ia- Reid Method of Interview/Interrogation basic-24 hrs.
10/01-10/02/92: Cedar Rapids, Ia-Child Protection: Our Responsibility-15 hrs.
11/30-12/04/92: ILEA, Violent Crime Analysis Seminar-40 hrs.
1/25-1/28/93: Johnston, Ia, Advanced Sex Crimes Investigator Seminar-28 hrs.
6/28/93: Collins Plaza, Cedar Rapids, IA-Lasting Scars of Sexual Abuse 8 hrs.
9/29-10/01/93: St. Lukes Child Protection Center (C.R.)Seminar on Child Abuse-24 hrs.
10/18/-10/22/93 Des Moines, IA (ILEA) Homicide and Other Death Investigation- 40 hrs.
2/21-2/24/94: Johnston, IA, Basic Sex Crimes Investigator's Seminar- 32 hrs.
5/16-5/17/94: Schaumburg, Il, Sexual Violence/Perpetrators
3/02-3/03/95: Clive, IA, Advanced Sex Crimes Investigator's Seminar- 16 hours.
6/05-6/08/95: Sioux Falls, SD, Child Abuse and Exploitation-32 hrs.
9/18-9/20/97: St. Louis, MO, System as Perpetrator-15 hours
5/4-5/5/99: Des Moines, IA-Reid Method of Interview/Interrogation Advanced- 16 hrs.
4/25/03: Marshalltown, IA, Search & Seizure
3/28-3/30/04: Alexandria, VA, Unit Commander/Protecting Children Online Seminar-20 hrs
9/04: Redondo Beach, Ca NDIA Regional Conference
5/05: Chicago, Il NDIA National Conference
7/17-7/21/06: Las Vegas, NV American Polygraph Association 41st Annual Training

ODDS & ENDS

PRESENTED BY

**NICK DREES
FEDERAL PUBLIC
DEFENDER**

Adam Walsh Child Protection and Safety Act of 2006

Signed into law July 27, 2006.

(The summary below borrows/steals heavily from outlines created by Amy Baron-Evans, Federal Defender Sentencing Resource Counsel, and James Whalen, Assistant Federal Defender.)

I. Expands federal jurisdiction

- A. Felony child abuse and neglect: added to list of offenses subject to federal prosecution when committed by an Indian "within the Indian country." 18 USC § 1153(a).
- B. Kidnapping: federal jurisdiction now reaches any kidnapping in which defendant crossed state lines or used instrumentality of interstate commerce during the commission or in furtherance of the crime, even if kidnapping was wholly intrastate.
- C. Obscenity: subjects to prosecution anyone who produces obscene matter with the intent to transport the matter in interstate commerce to sell or distribute it, and anyone engaged in the business of producing with the intent to sell or distribute. 18 USC §§ 1465 & 1466. Relieves government of need to prove that the defendant transported, transferred, or sold obscene material.

II. Creates new crimes

- A. Child exploitation enterprise: mandatory minimum 20 years for defendant who violates any of the following provisions
 1. § 1591 (sex trafficking of children),
 2. § 1201 (kidnapping) if the victim is a minor,
 3. chapter 109A (sexual abuse) if the victim is a minor,
 4. chapter 110 (sexual exploitation of children) except for recordkeeping violations,
 5. or chapter 117 (transportation for illegal sexual activity) involving a minor victim, as part of a series of felony violations constituting three or more separate incident and involving more than one victim, and commits those offenses in concert with three or more other persons.
- B. Obscene material on internet: 10-year maximum for knowingly embedding words or images into the source code of a website (that is, both the viewable and nonviewable content of a webpage) with intent to deceive a person into viewing obscene material. If intend to deceive a minor into viewing material harmful to minors, 20-year maximum. 18 USC § 2252C(b)
- C. Use of internet to distribute date rape drug: 20-year maximum for knowing use of internet to distribute with knowledge or reasonable cause to believe either that the drug would be used to engage in criminal sexual conduct or that the recipient is not an authorized purchaser. 21 USC § 841(g)(1)(A-B). Statute lists GHB and its analogues, ketamine and flunitrazepam, as date rape drugs. Also authorizes Attorney General to designate "any substance" as a date rape drug under the Administrative Procedure Act.
- D. Recordkeeping in the sex industry:
 1. New crime expands recordkeeping requirements (e.g., performer's name, birthdate, etc.) to include depictions consisting of digital images or digitally-manipulated images of real people. Also requires location of these records to be posted on every page of a website. 18 USC § 2257A.

2. Another new crime expands the recordkeeping requirements to anyone who produces images of simulated sexual conduct.
 3. Penalties include imprisonment up to one year for first offense and, for subsequent offenses, minimum of 2 years, maximum of 10 years.
- E. Sex offender registry
1. Failure to register as sex offender carries 10-year maximum or consecutive mandatory minimum 5 years for committing crime of violence while being required to register and failing to do so. 18 USC § 2250.
 2. Consecutive mandatory minimum of 10 years for committing an enumerated felony offense involving a minor while being required to register as a sex offender. 18 USC § 2260A.
 3. For false statement relating to offenses covered by sex offender registry, statutory maximum is increased from 4 to 8 years. 18 USC § 1001.
 4. Amended § 401 of Immigration and Nationality Act to provide that failure to register as a sex offender is a deportable offense and to bar convicted sex offender from having family-based petitions approved.
 5. Congress directed the sentencing commission to consider guidelines implementing the failure to register offenses.

III. Increases penalties

- A. Crimes of violence against minors - 18 USC § 3559(f)
 1. Murder: mandatory minimum of life for death-eligible murder; 30 years otherwise
 2. Kidnapping and maiming: 25-year mandatory minimum
- B. All other crimes of violence against minor resulting in serious bodily injury or committed with a dangerous weapon (undefined) carry mandatory minimum 10 years.
- C. Sex trafficking of minors - 18 USC § 1591
 1. Use of force, fraud, or coercion and involving minor under 14: mandatory minimum 15 years.
 2. Involving 14 to 17-year-old and no force, fraud, or coercion: mandatory minimum 10 years and increases maximum to life.
- D. Aggravated sexual abuse - 18 USC § 2241(c)
 1. Victim less than 12 or between 12 and 15 and force or threats involved: mandatory minimum 30 years.
- E. Sexual abuse, 18 USC § 2242 - statutory maximum raised from 20 years to life.
- F. Sexual abuse of a ward, 18 USC § 2243(b) - raises mandatory minimum from 5 years to life.
- G. Abusive sexual contact, 18 USC § 2244 - raises statutory maximum from 10 years to life.
- H. Coercing or transporting a minor to engage in criminal sexual activity, 18 USC §§ 2422(b) and 2423(a) - doubled the mandatory minimum to 10 years.
- I. Child pornography, 18 USC § 2251(e) - increased mandatory minimum to 30 years if death results.
- J. Use of misleading domain name on internet with intent to deceive a minor into viewing

material harmful to minors, 18 USC § 2252B - increased statutory maximum from 4 years to 10.

- K. Using minor outside US to produce sexually explicit depiction intending to import into US, 18 USC § 2260(c)(1) - raised statutory maximum from 10 years to 30 and created 15-year minimum; minimum 25 years, maximum of 50 years for second offense; minimum 35 years, maximum of life for subsequent offenses.
- L. Transporting, receiving, shipping, possessing, etc. a sexually explicit depiction of a minor with intent that it be imported into US, 18 USC § 2260(c)(2) - raised maximum from 10 years to 20 and created 5-year minimum for first offense; raised maximum from 20 years to 40 and created 15-year minimum for subsequent offenses.
- M. Failure to report child abuse, 18 USC § 2258 - raises from Class B misdemeanor to Class A, punishable by up to 1 year in prison.
- N. Amends 18 USC § 2245 (“Sexual abuse resulting in death”) to add predicate offenses and authorize death penalty when defendant commits murder in course of committing one of the listed sex crimes. (Former, broader version of statute had authorized death penalty if “death resulted.”).

IV. Eliminates statute of limitations for 18 USC §1201 (Kidnapping a Minor), 18 USC § 1591 (Sex Trafficking) and for all felonies in Chapter 109A (Sexual Abuse), Chapter 110 (Sexual Exploitation and Other Abuse of Children) except for recordkeeping violations in §§ 2257 and 2257A, and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes).

V. Amends the Bail Reform Act:

A. Adds to the list of circumstances in which government can request a detention hearing, 18 USC § 3142(f):

(f) Detention hearing.--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community--

(1) upon motion of the attorney for the Government, in a case that involves--

- (A) a crime of violence, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
- (B) an offense for which the maximum sentence is life imprisonment or death;
- (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);
- (D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921) or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code, or

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--

- (A) a serious risk that such person will flee; or
- (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

B. But bear in mind the limitations on government's authority to request detention:

1. *U.S. v Ploof*, 851 F2d 7 (1st Cir 1988) (statute does not authorize detention unless judge finds one of § 3142(f) conditions for holding a hearing exists; claim that defendant poses a danger unrelated to and unlikely to affect proceedings on pending federal charges does not authorize detention).
 2. *U.S. v Byrd*, 969 F2d 106, 109 (5th Cir 1992) (“hearing can be held only if one of the six circumstances listed in (f)(1) and (2) is present . . .”)
- C. Amendment does not appear to extend to 18 USC §§ 3143 regarding release pending sentencing or appeal.
 - D. Amendment also adds requirement that pretrial release conditions for defendants charged with listed offenses involving minors must include electronic monitoring and other conditions including a curfew.
- VI. Extends Attorney General’s authority to promulgate regulations requiring DNA collection from persons who are “facing charges,” (that is, charged by indictment, information, or complaint but not under arrest) or convicted and in custody on non-felony offenses. 42 USC § 14135a.
- VII. Restricts discovery in child pornography cases, 18 USC § 3509(m)(1-2): so long as the government provides “ample opportunity for inspection, viewing, and examination,” of any material that constitutes child pornography, it must “remain in the care, custody, and control of either the Government or the court.”
- VIII. Creates civil commitment for “sexually dangerous persons,” 18 USC § 4248(a):
- A. If person is in B.O.P. custody, or has been deemed incompetent, or has had all charges dismissed because of mental condition, can be certified as “sexually dangerous” if has engaged or attempted to engage in sexually violent conduct or child molestation and suffers from a serious mental illness, abnormality, or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation.
 - B. If court finds by clear and convincing evidence after hearing that the defendant is sexually dangerous, the Attorney General must commit person to state custody for treatment or place him in “suitable facility” until state agrees to accept him or he is no longer sexually dangerous.
- IX. Extends victim rights to permit civil actions brought by minor victims of sex crimes regardless of whether person suffered injury while a minor. 18 USC § 2255(a).
- X. Expands sex offender registries:
- A. Requires each jurisdiction to maintain a jurisdiction-wide sex offender registry in compliance with the statute’s requirements. 42 USC § 16912.
 - B. Requires offenders to appear in person at specified intervals depending on severity of the person’s offense. 42 USC § 16916.
 - C. Requires Attorney General to maintain national database at FBI to be known as the National Sex Offender Registry. 42 USC § 16919.

D. Justice Department is to provide the software necessary to implement this program within two years, and each jurisdiction is required to implement it within three years of enactment or one year after receiving software, whichever is later. 42 USC § 16924. State's failure to comply could result in 10% reduction in crime control funding. 42 USC § 16925.

XI. Adds restrictions on probationers and people on supervised release:

- A. Compliance with the Act is mandatory condition of probation and supervised release. 18 USC § 3563(a).
- B. If a defendant required to register commits any offense under Chapter 109A (Sexual Abuse), 110 (Sexual Exploitation and Other Abuse of Children), or 117 (Transportation for Illegal Sexual Activity) for which imprisonment for a term longer than one year can be imposed, the court must revoke supervised release and impose a term of imprisonment of not less than 5 years for the revocation.
- C. Adds condition of supervised release or probation requiring that, on reasonable suspicion of violation of probation or supervised release or unlawful conduct, sex offenders must submit to searches of their property, computers, and residence, at any time, without a warrant.

XII. Directs the Committee on Rules of Evidence to study the need to eliminate the marital communications privilege and the adverse spousal privilege in any case in which a spouse is charged with a crime against a child of either spouse or any child under the custody or control of either spouse.

**FORENSIC ISSUES
IN METH CASES**

PRESENTED BY

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Methamphetamine, Clandestine Labs And Other Interesting Information

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

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

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

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

Gene N. Gietzen

Methamphetamine

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

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

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

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

The effects of methamphetamine include:

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

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

Methamphetamine in the base form exists as a yellow liquid. In the base form, meth is not readily useable and most meth encountered will be in the salt form, generally as Methamphetamine Hydrochloride. In many instances, you will hear talk about d-meth or l-meth. D-methamphetamine is the psychoactive drug and differs from the "l" version due to the placement of the Methyl group (CH₃) on the molecule.

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

The Analysis of Methamphetamine

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

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

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

Color tests

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

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

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

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

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

Thin Layer Chromatography

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

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

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

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

Infrared Spectroscopy

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

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

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

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

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

Gas Chromatography/Mass Spectroscopy

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

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

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

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

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

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

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

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

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

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

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

Methamphetamine Synthesis Methods

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

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

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

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

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

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

2. Most of the chemicals used in these methodologies are no longer easily available without raising a number of red flags. P-2-P is now a Controlled Substance and chemical companies will not sell any of these to individuals. This has created the formation of "dummy" lab names and shipped to "store fronts."
3. These methods were "real" cooking methods. Refluxing is a term used in chemistry to denote a substance is allowed to boil. On top of the reaction vessel is an apparatus called a

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

4. The older methods required the use of specialized chemistry equipment. Three necked flasks, condensers and round bottom heaters are just a few. Again in today's world these types of purchases are monitored by both the chemical supply company and law enforcement.
5. These methods were also much more dangerous. We hear today about the hazardous nature of meth labs, but I believe these older methods were even more hazardous. There was a strong potential for fire as heating was involved. If the reaction was stopped prior to completion a definite explosive potential existed. Couple this with the use of the same solvents in place today and it is a wonder more individuals didn't lose their lives in clandestine lab related accidents.
6. Last, but not least, these methods took a great deal of time. Cooking times of multiple days were not uncommon. The longer it takes to achieve a product, the greater the potential for detection.

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

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

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

Pseudoephedrine/Ephedrine

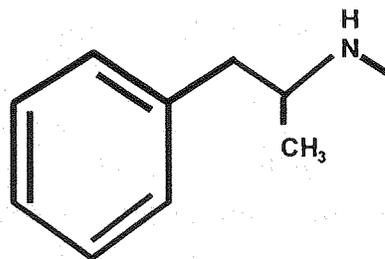
The most common precursor to the current clandestine manufacture of methamphetamine is either ephedrine or pseudoephedrine (PSE). We will discuss the differences between these two shortly.

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

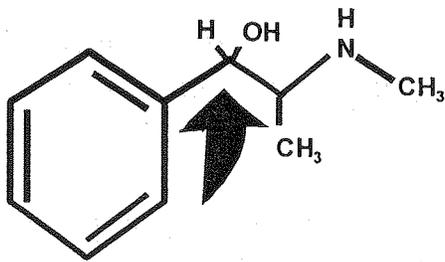
A specie of this herb, *Ephedra nevadensis* is found in the Southwest deserts. It was used as a tea by the early settlers and has gained the name of "Mormon Tea", "Brigham Tea" and "Desert Tea". The North American plant is generally believed to have no pharmacologically active alkaloids.

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

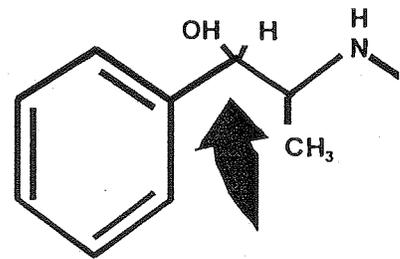
Now let's look at the chemical structures of these three and note the reason pseudoephedrine/ephedrine is so popular.



Methamphetamine



Ephedrine



Pseudoephedrine

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

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

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

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

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

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

Extraction of Pseudoephedrine

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

Look at a box of Sudafed 12 hour caplets.

ACTIVE INGREDIENT: Each coated extended-release tablet contains Pseudoephedrine Hydrochloride 120 mg.

INACTIVE INGREDIENTS: Carnauba Wax, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Polyethylene Glycol, Povidone, and Titanium Dioxide. Printed with edible blue ink.

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

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

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

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

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

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

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

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

Lithium/Anhydrous Ammonia Method

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

The most common ingredients are:

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

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

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

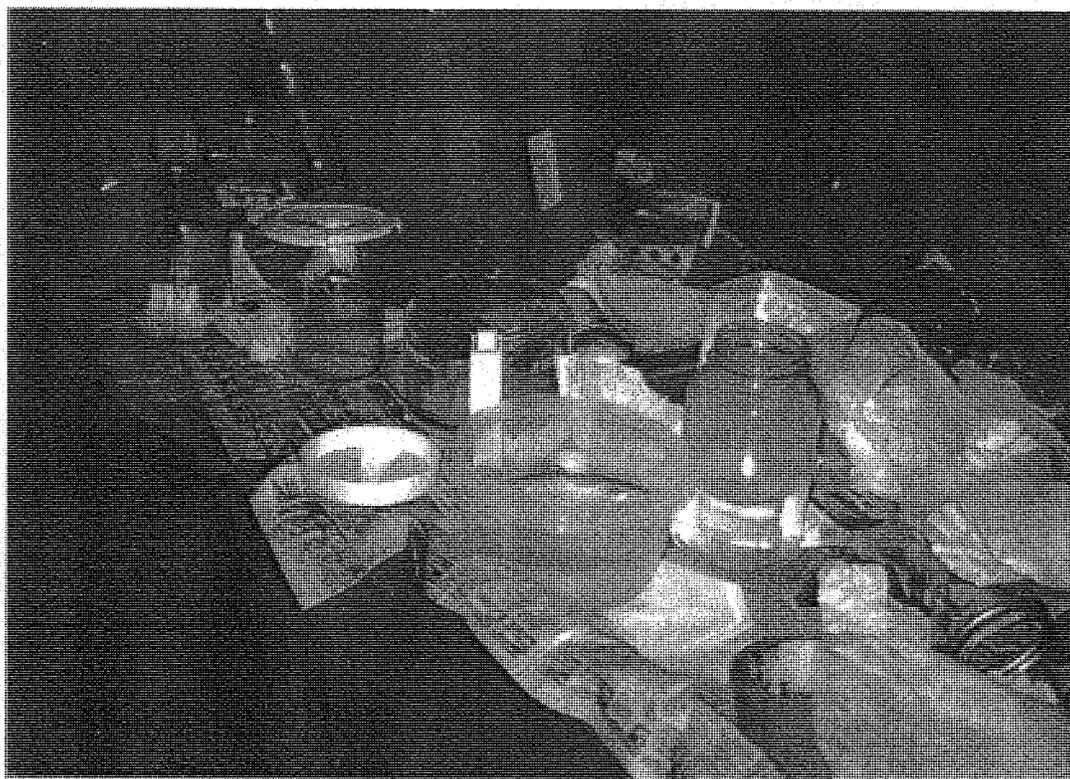
The general scheme of this method is something like the following. Keep in mind there are as many variations to this as there are fish in the sea.

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

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

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

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



(An example of the Anhydrous Ammonia/Lithium apparatus)

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

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

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

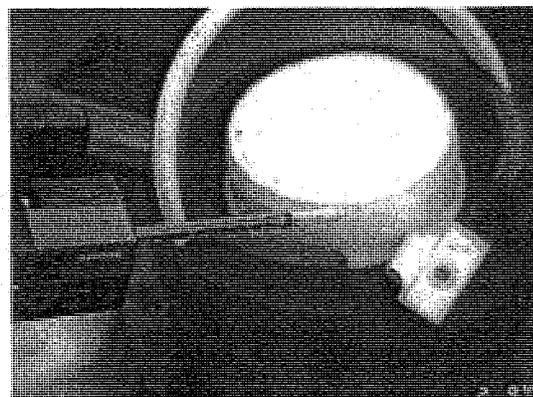
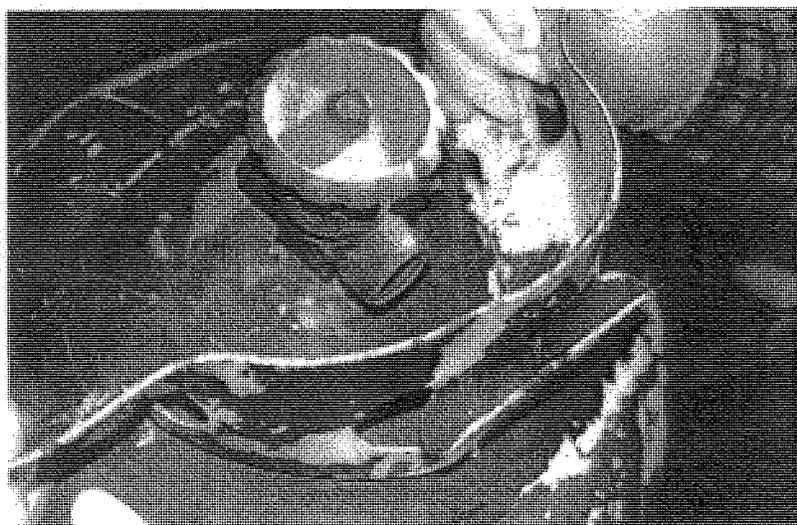
The anhydrous ammonia found in these large tanks is in liquid form. This creates a problem in obtaining this substance and storage until use. I have read various methods by which this is accomplished. In several cases, the suspect's purportedly used 5 gallon buckets which they sealed and took back to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

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

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

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

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



Drager Tube Test for ammonia

Blue/Green discoloration around the valve)

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

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

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

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

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

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

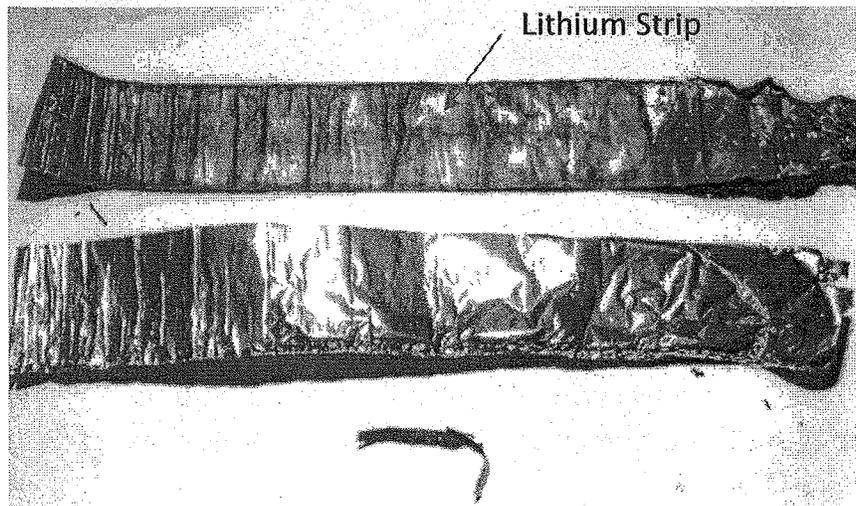
The item of interest in these batteries is the lithium metal. Lithium metal is silvery-white which becomes yellowish on exposure to moist air. This metal also carries some potential symptoms of mild to severe over-exposure that can be gained through handling without proper protection:

1. Impaired concentration
2. Lethargy
3. Irritability

4. Muscle weakness
5. Confusion
6. Impaired consciousness

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

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



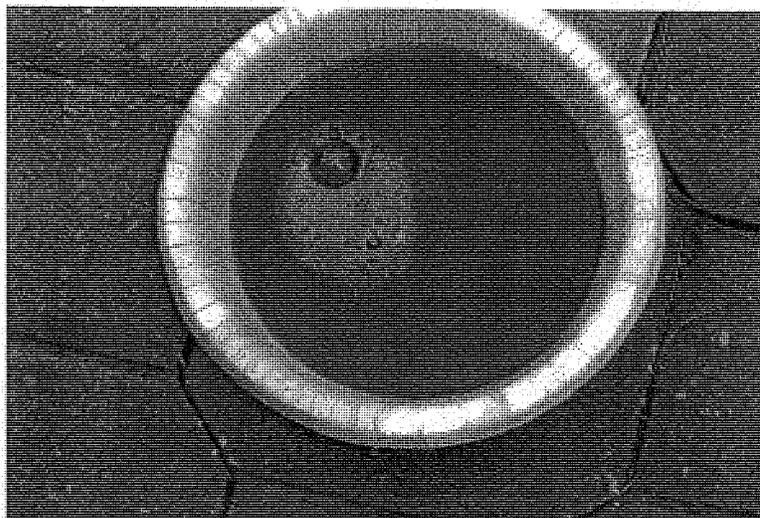
The lithium strip is approximately 10" long and is lighter than the aluminum foil below it. It will darken in light and burn with greater intensity as (bright and hot). In a fire, it will leave very little evidence of its existence.

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

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

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

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



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

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

Hydriodic Acid/Red Phosphorus Method

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

The ingredients for this Method include:

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

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

The general scheme for this method is as follows:

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

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

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

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

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

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

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

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

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

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



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

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

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

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

Substantial Step

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

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

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

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

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

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

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

Chemical Odors

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

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

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

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

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

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

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

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

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

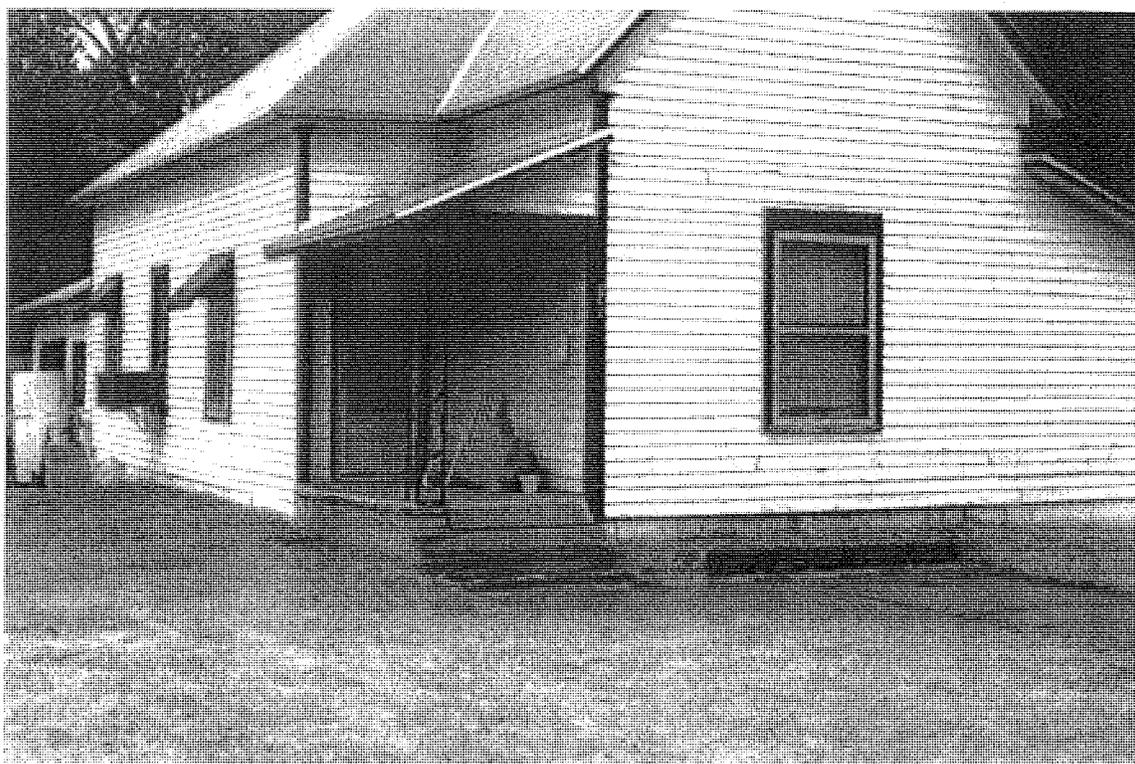
FINDINGS: There were no cans of starting fluid found inside or around the garage. The jar inside the microwave oven did contain a white powder, however, the solvent was found not to be ether. The only chemical of note was charcoal lighter fluid used to start the barbeque. The investigators would later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

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

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

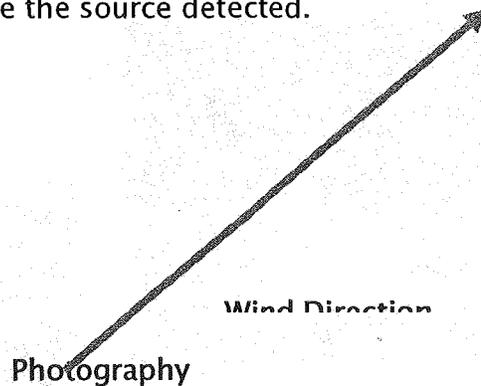
It is also important to obtain the weather data for that date as well as a diagram of the scene.

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



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

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



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

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

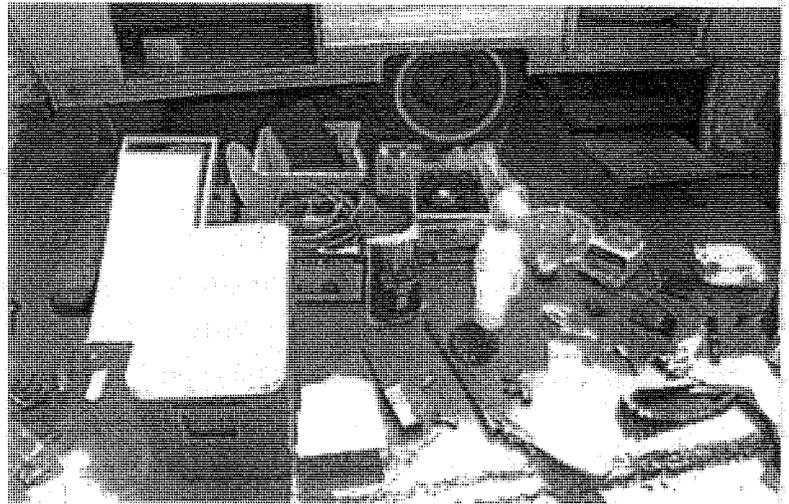
This photograph may be a true and accurate depiction of what was found, but it certainly is not true and accurate of where it was found. These types of photographs can make a small operation look large and if presented in court to a jury, it may have greater misleading potential than evidential.

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

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

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

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



Gas Generators

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

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

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

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

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

Solvents

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

1. **Acetone** A good general solvent readily available. It is recommended for the extraction of ephedrine/pseudoephedrine as well as extraction of the final product.
2. **Toluol** Another good general solvent. This was once considered the solvent of choice in the extraction of the eth from the reaction mixture, but is rarely found today.
3. **Coleman Fuel** Another common item. This is encountered somewhat frequently. This is a higher weight petroleum hydrocarbon and somewhat more difficult to evaporate but is used to extract the precursor.
4. **Heet** This product removes water from gas tanks and contains methyl alcohol. This is most commonly found in the extraction of the pseudoephedrine.
5. **Ether** Generally found in the form of starter fluid and is known as petroleum ether. This is good solvent for the extraction of meth. This is probably the most volatile solvent found at scenes. It is easily ignited and highly flammable by nature.

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

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

Destroyed Evidence

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

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

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

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

Fingerprints and Other Evidential Considerations

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

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

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

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

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



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

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

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

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

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

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

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

Bench Notes

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

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

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

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

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

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

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

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

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

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

Field Test Kits

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

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

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

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

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

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

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

Investigator Testimony

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

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

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

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

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

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

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

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

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

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

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

21 § 858

Endangering Human Life While Illegally Manufacturing A Controlled Substance

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

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

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

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

Outside Testing

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

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

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

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

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

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

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

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

Case Reviews

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

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

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

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

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

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

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

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

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

Experts

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

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

“What type of expert do I need?”

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

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

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

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

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

What is the testimonial style you wish to present?

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

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

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

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

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

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

Summary

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

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

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

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

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

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Theoretical Yields

Introduction

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

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

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

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

Part 1 – Clandestine Labs

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

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

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

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

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

Part 2 – Factors Affecting Methamphetamine Synthesis Theoretical Yields

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

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

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

Part 3 – Precursor Material

The most common means of determining theoretical yields are by:

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

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

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

Example

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

Therefore 1 gram of Ephedrine will yield 0.92 grams of Meth

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

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

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

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

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

Part 4 – Extraction of Precursor

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

ACTIVE INGREDIENT: Each coated extended-release tablet contains Pseudoephedrine Hydrochloride 120 mg.

INACTIVE INGREDIENTS: Carnauba Wax, Hydroxypropyl Methylcellulose, Magnesium Stearate, Microcrystalline Cellulose, Polyethylene Glycol, Povidone, and Titanium Dioxide. Printed with edible blue ink.

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

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

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

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

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

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

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

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

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

Part 5 – Theoretical Yield Estimations Involving Essential Chemicals

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

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

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

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

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

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

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

Part 6 – Theoretical Yield Involving Multiple Methods

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

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

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

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

Part 7 – Theoretical Yields from Witness Testimony

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

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

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

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

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

Part 8 – Theoretical Yields from “Tailings”

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

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

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

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

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

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

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

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

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

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

Part 9 – Drug Purity

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

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

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

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

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

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

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

Part 10 – Mixture and Substance Issues

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

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

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

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

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

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

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

Part 10 – Mixture and Substance Issues – Powders

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

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

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

Part 10 – Mixture and Substance Issues – Liquids

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



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

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

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

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

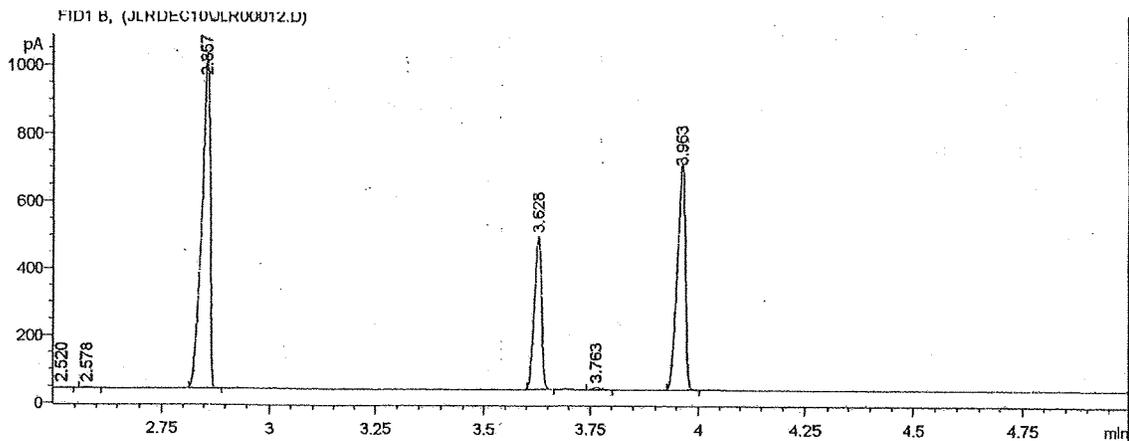
In preparing for these seminars I ran into case law from several years ago that states something to the effect when the defense challenges the theoretical yield, the burden of proof shifts to them. Sorry, couldn't find the site, but it is really irrelevant in that most cases the burden shifts to you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

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

Part 10 – Mixture and Substance Issues – Bench Notes

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

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



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

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

In this example, the total area of all data peaks is 6.18 cm². The area of the methamphetamine peak is 2.1 cm². This indicates of the known data present on the printout, methamphetamine composes a maximum 34% of the total area. If meth is found to be approximately 34%, then this percentage could be applied to the total weight of the powder or liquid.

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

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

Part 11 – Defense Testing

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

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

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

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

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

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

Part 12 – The Role of Scientific Literature in Theoretical Yields

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

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

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

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

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

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

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

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

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

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

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

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

Part 13 – Pre-Sentence Investigation Reports

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

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

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

Part 14 – Photographs

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

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

Summary

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

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

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

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

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

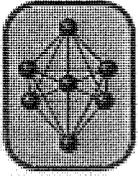
“The prosecutor contended, and the district judge concluded, that seizures of methamphetamine did not ‘reflect the scale of the offense,’ so the parties set out to determine ‘the size or capability of any laboratory involved.’ But instead of inquiring whether the laboratory was large, sophisticated, efficient, and so on—keys to its ability to turn out methamphetamine, and therefore good clues to how much of that drug this operation *had* produced (and thus to the scale of the offense)—both litigants and judge asked instead how much methamphetamine could have been made using the stock of raw materials on hand when the police arrived.”

“The district court concluded that the pseudoephedrine could have been used to make an equal weight of methamphetamine, but this finding is clearly erroneous, for it conflicts with expert testimony offered by both sides. Under Application Note 12, the finding is also irrelevant because it does not demonstrate ‘the size or capability of any laboratory involved.’”

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

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

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



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Clandestine Meth Labs

Paradigms, Preparation and other Phun Information

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

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

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

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

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

Understanding the Lab

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

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

1. The lithium is added to the anhydrous. The next step involves the addition of the precursor. Some labs "ice" the reaction vessel in an attempt to keep the anhydrous from evaporating and increasing the yield, while others involve going to the farmer's field adding the anhydrous from the tank to a jar that already contains the lithium and precursor and letting the reaction occur until all anhydrous is gone taking the finished product to another location for "gassing."
2. Some labs involve using a "splash" of anhydrous. By this the precursor and lithium are placed in a jar and a small amount of anhydrous is added and the jar swirled. This promotes even lower yields. Analysis conducted on these types of cases often find undissolved lithium metal. There must be the right amount of anhydrous, lithium and precursor for the reaction to occur with some semblance of yield.
3. Some cooks extract or "rinse" the Pseudoephedrine before it is added to the reaction mixture while others do not. Those that do not significantly decrease the yield due to the presence of the "inert ingredients" found in the OTC meds.

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

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

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

Theoretical Yields

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

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

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

1. To derive a 50% yield, you take the amount of precursor and divide it in half. A simple process that assumes a 1:1 conversion rate of PSE to meth. The Eschmann case (227 F.3d 886, 7th Circuit, 2000) rule a 1:1 conversion is inappropriate. The conversion factor is based upon the molecular weights of meth and PSE and is found to be 1 to 0.92, meaning 1 gram of PSE will produce .92 grams of Meth.
2. Nila Bremer and Robin Woolery of the Iowa Department of Public Safety conducted a study *"The Yield of Methamphetamine, Unreacted Precursor and Birch By-Product With the Lithium Ammonia Reduction Method As Employed in Clandestine Laboratories"* (Midwest Association of Identification Newsletter, 1999), known as "The Iowa Study" They concluded "in the average situation where the exact procedure followed at a site is not known, a range of 40 - 50% yield of Methamphetamine Hydrochloride is a reasonable estimation."
3. The Iowa Study also contained information that would allow yield opinions to be higher or lower than the above values and I have reviewed lab reports from their agency that indicated a 17 - 20% yield depending on the nature of the evidence and laboratory analysis.

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

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

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

Multiple Defendant Labs

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

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

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

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

I would suggest you read the statements of the co-defendants carefully and determine if they are all consistent in describing your client's participation. I am reminded of a case where the other three co-defendant's statement had the defendant being the precursor supplier, the

person who got the anhydrous and the person who did the gassing. Not bad for a person the police surveillance showed arrived about 10 minutes before the raid! This defendant's actual "role" in the lab was never shown.

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

Historical Evidence

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

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

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

Qualifiers

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

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

4. Indicated she purchased meth from the defendant on approximately 50 occasions with the most being ½ ounce.

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

Non Specific Information

The “non specific information” examples are as follows:

1. Indicated she purchased 10,000 pills
2. Obtained boxes of cold and allergy medication from Dollar General.
3. Cooked with defendant 3 times using 1,000 pills yielding about an ounce.

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

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

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

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

“Double Counting”

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

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

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

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

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

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

Theoretical Yields from Statements

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

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

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

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

Preponderance of the Evidence

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

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

Manufacturing and Distribution Charges

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

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

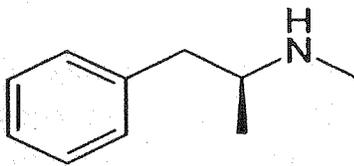
Included in the discovery was the defendant's rap sheet including dates of incarceration. While this makes for interesting reading, under normal circumstances I would shred this type of information as not applicable to my efforts. For some reason it avoided this ultimate fate.

I found seven sales that were supposed to have occurred during the time the defendant was in jail. A little leg work by the attorney to prove these incarceration times went a long way to

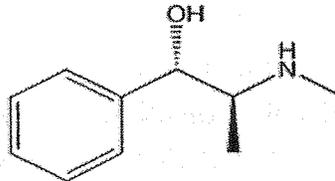
strongly questioning the reliability of a few witnesses, lowering the total amount sufficient to bring it to a lower sentencing guideline level.

Phenylephrine – A replacement for Pseudoephedrine?

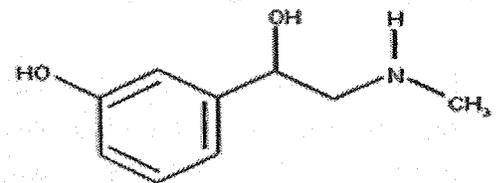
Over the past six months I have received a couple of cases involving Phenylephrine as the precursor in meth cooks. Below are the chemical structures for these substances.



Methamphetamine



Pseudoephedrine



Phenylephrine

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

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

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

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

Restitution

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

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

I was asked to review the case on the basis of "endangering human life" concepts. The photographs also failed to reveal any indication of "overt" damage caused by any cook or process of the cook; there were no burn holes in the carpeting, staining or damage to the furniture or walls. All the jars found in the room appeared to be capped and sealed and none of the officers who were present reported any "chemical odor" present during the investigation. There was no air monitoring conducted inside the room before the remodeling was started, therefore there was no evidence to dictate any "actual" or "potential" danger actually existed.

Summary

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

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

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

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

**DEFENSE OF CHILD
PORNOGRAPHY CASES**

PRESENTED BY

**WALLY TAYLOR
ANNE LAVERTY
STEVE SWIFT**

ATTORNEYS

DEFENSE LAWYER'S GUIDE TO CHILD PORNOGRAPHY AND CHILD EXPLOITATION OFFENSES

I. CHILD PORNOGRAPHY CRIMES

A. Two main statutes used by the U.S. Attorney's Office:

18 U.S.C. § 2252A: Possession, Receipt and Distribution of Child Pornography
18 U.S.C. § 2251(a): Production of Child Pornography.

18 U.S.C. § 2252A – Possession, distribution or receipt of child pornography

Punishes individuals who knowingly distribute child pornography in interstate or for foreign commerce;

Punishes individuals who knowingly receive or distribute child pornography that has been mailed, or shipped or transported in interstate or foreign commerce;

Punishes anyone who knowingly possesses child pornography that has been mailed, shipped or transported in interstate or foreign commerce; or child pornography that has been manufactured using materials that have traveled in interstate or foreign commerce.

Penalties include not more than 10 years, but if prior sex offense, not less than 10 nor more than 20 years for the crime of Possession. For the crime of Receipt and Distribution, not less than 5 years and not more than 20 years, but if there's a prior conviction for prior sex offense, not less than 15 nor more than 40 years.

Notable Elements.

1. Conduct must be knowing conduct;
2. Materials must meet definition of child pornography (see 18 U.S.C. §2256);
3. Materials must depict at least one real child;
4. There must be a connection to interstate commerce, such as transmission or made using items in interstate commerce.

18 U.S.C. § 2251(a) – Production of Child Pornography

Punishes individuals who use, persuade, induce, entice, or coerce minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, if:

1. Such person knows or has reason to know that such visual depiction *will be transported* in interstate or foreign commerce; or
2. that visual depiction was *produced using materials* that have been transported in interstate or foreign commerce by any means, including by computer; or
3. such visual depiction has *actually been* transported in interstate or foreign commerce or mailed.

Penalty – not less than 15 nor more than 30 years. Subject to increases if there are prior sex offenses of 25 years to 50 years, or 35 up to life. Furthermore, if in the production of the offense individual engages in conduct resulting in a death, their punishment is death or imprisonment by term of up to life.

Notable Elements.

1. Must depict one real child. Defendant would not need to know that the child is a minor.

It may be possible to challenge this element to the extent that it does not require scienter. Every criminal statute includes a scienter requirement, even when the statute by its terms does not contain one. United States v. X-Citement Video, Inc., 513 U.S. 64, 70, 115 S.Ct. 464 (1994).

2. In connection with interstate commerce, includes pornography made using items that have traveled in interstate or foreign commerce; or intended to be sent over interstate.
3. United States v. Mugan, 394 F.3d 1016 (8th Cir. 2005). This would suggest that the use of digital cameras, video cameras and cell phones (most of which are manufactured abroad) creates federal jurisdiction.

B. Other Crimes – Communication and Transportation Crimes

18 U.S.C. § 2422: Coercion and Enticement of Minors

Note that for this section defendant must have knowledge of a defendant's age.

18 U.S.C. § 2423: Transportation of Minors

18 U.S.C. § 2421: Transportation for Illegal Sexual Activity ("The Mann Act")

18 U.S.C. § 2252B - Misleading Domain Name

Covers both misleading any individual (2 year maximum penalty) or misleading with the intent to deceive a minor into viewing material (4 year max).

II. PROTECTION OF CHILD WITNESSES

A. 18 U.S.C. § 3509 - provision for protection of child witnesses in federal criminal trials

This includes keeping a victim's identity confidential, not to be used in public pleadings, and not to be used in open court.

Also provides for closing of a courtroom and exclusion of members of the press and others who don't have direct interest in the case. Consider the criteria that the court has to determine in establishing that order and concluding the need to determine "substantial psychological harm to the child or would result in the child's inability to effectively communicate." Compare with Coy v. U.S., 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) and Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). These cases deal with the confrontation clause and the authorization of a child to testify either in a different room or using a screen device. Note distinction in the White v. Illinois case between exceptions to hearsay and the confrontation clause. White v. Illinois, 502 U.S. 346, 112 S.Ct. 736 (1992). This case stands for the proposition that statements can be offered under the spontaneous declaration or medical exam exceptions to hearsay. Note the concurring opinion [Justice Thomas] trying to draw this distinction between the confrontation clause and the hearsay issue.

B. Note also a recent amendment to § 3509 affecting discovery in federal cases:

18 U.S.C. § 3509(m)

Prohibition on reproduction of child pornography.

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

This provision, new in July 2006, severely limits defense access to the evidence. Of course, since the definition of “child pornography” is in the eye of the beholder, law enforcement will keep *everything*. And since the images (or computer disks or chips) have to stay in the custody of FBI or USPS:

- you can only see them by appointment, usually at the agency office with an agent looking over your shoulder
- defense expert cannot have them sent to an off-site lab to be examined
- you don't get a full set of exhibits before, during or after trial

III. DEFENSE AND LITIGATION OPTIONS

A. Motion *in Limine*:

1. Evidence of prior convictions of criminal conduct, including criminal sexual conduct.
2. Evidence of images found on the computer or in possession that are not images of child pornography as that term is defined in 18 U.S.C. § 2256.
3. Testimony concerning the arrest of individuals purportedly involved in the creation of images identified by series name or circumstances surrounding the alleged abuse of the person in the images.

4. Evidence of defendant's prior convictions for failure to register as a sex predatory offender.
5. Beware of motions in limine filed by prosecutor attempting to emasculate your defense

B. Motions to Suppress Evidence: Evidence of the images of alleged child pornography that are seized from the computer. There's an excellent article in the National Association of Criminal Defense Lawyers magazine "Champion." The June 2003 article "When The Government Seizes and Searches Your Client's Computer." In addition, see for further background the August 2001 Champion article, "Hard Times With Hard Drives."

C. Motion to Dismiss – constitutional issues

D. Trial:

1. Expect to use only initials for victim(s) name(s) in court and pleadings
2. All nudie or naughty exhibits will be sealed – don't expect to ever see them again after trial!
3. Consent is not a defense
4. Prior sexual behavior by victim is generally inadmissible (FRE 412 "rape shield" rule) but in some circumstances you may be able to get into evidence of *specific* instances of sexual behavior by the victim – but there are detailed rules governing filing a pretrial motion requesting determination of admissibility. FRE 412(c)
5. Ask a LOT of questions of the panel in voir dire – you are likely to elicit hidden opinions the longer you engage a prospective juror in discussion
6. Discuss thoroughly with the client any "skeletons" that may be lurking – FRE 414
7. Sentencing guideline computation considerations – discuss all potential issues with client and prosecutor during plea negotiations
8. Don't let prosecutor keep the photos up on the elmo screen for extended period – influences the jury

9. Other defense ideas:

a. Affirmative defenses listed in statute

“not a child but an adult” 18 U.S.C. §2252A(c)

“less than three images and I destroyed them” 18 U.S.C. §2252A(d) and 2252(c)

b. Misleading domain name: Question as to what constitutes a misleading domain name and whether commercial establishments intend to deceive persons into viewing materials. Perhaps it could be argued that a commercial establishment would want individuals to be able to find their location, and would not believe that individuals would be deceived into viewing their domain, and then decide to view and pay to view those sites. Perhaps different from those individuals who do not have a commercial interest and who might by prank or malicious motive seek to foist upon an individual visual images that would be otherwise offensive.

c. S.O.D.D.I. (“some other dude did it”) – reasonable doubt that another person used the computer

d. Intent to produce pictures vs. intent to engage in sexual activity

e. First amendment/artistic endeavor (attack definition of “lascivious exhibition”)

f. Deleted files (on issue of intent)

g. Defective chips (if an “image” is even incapable of being stored, does it become a “visual depiction”)

h. Commerce clause, post-Gonzales v. Raich

i. Attack the victim (e.g. 12 year old lies about age to entice defendant to come to Iowa)

E. Forensic Experts:

1. Form for the application and brief requesting the appointment of a forensic computer expert;

2. U.S. Attorney’s position that child pornography materials should not be turned over to experts, as potential “contraband.” 18 U.S.C. § 3509(m)

3. Things to have the expert look for:

Zip files that have not been unzipped

Deleted files, along with dates and times that the files have been created and deleted. Determine if they were deleted in a short period of time or over a longer time.

Dates and times that the files have been created, modified, accessed

Determine if large numbers of files have been downloaded within a short period of time

Review file names, and directory names where the files reside

Within the internet access program, look at favorites that are short-cuts used to access the internet

Look at the list of web sites most recently accessed

Within search engines, such as Google, look at the recent search criteria

Each program generally has lists of most recently accessed files. Review that list.

Look in temporary directories for file names, particularly porn-like file names

F. Pretrial Diversion - Infrequently but occasionally offered. See Appendix for a copy of the Agreement for Pretrial Diversion setting forth the agreement to defer prosecution and the agreement to waive speedy trial, etc.

G. Concurrent state court prosecution – recommend getting the fed case done first. State judge more likely to grant concurrent or suspended state sentence if they see defendant is going to federal prison for a long time.

IV. GUIDELINE ISSUES.

A. Applicable guidelines.

§ 2G2.1 sexual exploitation (production of pornography)

§ 2G2.2 possession/receiving/trafficking

§ 2G2.3 selling/buying children for use in production of pornography

§ 2G1.3 traveling to have sex with minor

As you may expect, production (“sexual exploitation”) carries the higher base offense level: 32. Possession, receipt, transporting such as e-mailing or posting on a website will usually carry a base offense level 22.

BUT BEWARE: it’s *very* easy to find your client is enhanced by Specific Offense Characteristics up into the high level 30s, 40s, or even (*gasp!*)level 50.

B. Some common enhancements (varies by guideline):

1. “prepubescent” victim (less than age 12) – most “collectors” will probably have one of these, and you only need *one* underage image to trigger the enhancement (2 to 4 levels)

2. “sexual contact” was involved in committing the offense – most “producers” will have this (2 to 4 levels)

3. “sadistic or masochistic conduct or other depictions of violence” – handcuffs anywhere in a photo, or photos of penetration perpetrated upon a fairly young child will get you this one, per the 8th Circuit – even if defendant did not intend to possess the material (i.e. inadvertent download!) and there was only *one* image (4 levels)

4. “babysitter or relative” – if the victim was in care, custody or control of the defendant (2 levels)

The application note says this enhancement is intended to have broad application. I think this pronouncement and other similar statements in the guidelines that its provisions are to be interpreted broadly violates the long-standing rule of statutory interpretation in criminal law that criminal statutes are to be interpreted and construed narrowly.

5. “road sex” - enticing minor to traveling to have sex (2 to 7 levels)

6. “pecuniary gain” or “receipt/expectation of receipt of thing of value”

7. “distribution” (2 levels; if to a minor then 5 levels)

appears to have a loose definition – may even include merely showing the computer screen to another person

“minor” can even mean undercover officer posing as a child, for some crimes

8. “use of computer” or AOL – pretty much every case has this somewhere (2 levels)

9. number of images (every image counts as a single one, even if there are duplicates; videos count for 75 images or maybe more if they’re really long) (2 to 5 levels)

10. Knowing misrepresentation of the defendant’s identity (2 levels)

The government must show that the purpose of the misrepresentation was to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sex. So if the defendant can show that any misrepresentation was for some other purpose, this enhancement should not apply.

11. Undue influence on the minor to engage in sex (2 levels)

The application note says that if the defendant is at least 10 years older than the minor, undue influence is presumed. The application note also states that the court should closely consider the facts of the case to determine if the influence exerted was such as to compromise the voluntariness of the victim’s behavior. There is no Eighth Circuit case on this point, but two cases do discuss this point. United States v. Chriswell, 401 F.3d 459 (6th Cir. 2005); United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003). In both cases, the actual issue was whether a “victim” who was really a government agent could be unduly influenced. But the courts did say that undue influence means a situation where the defendant has succeeded in altering the behavior of the minor and displays an abuse of superior knowledge, influence and resources.

12. Use of a computer to persuade, induce, coerce the victim to engage in sex (2 levels)

The enhancement only applies if the computer was used to directly communicate with the minor or someone having custody or control of the minor. Beyond that, the application notes are not helpful. Many times the computer is used simply to initiate the contact with the minor through a chat room or e-mail. Sometimes it is the minor who uses the computer to meet men and there is no evidence of the need to persuade, induce or

coerce the minor. It does not appear that simply using the computer to communicate is enough to implicate this enhancement.

C. Some really special enhancements:

1. § 2G2.2(b)(5) “defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor”

a. means any combination of 2 or more separate instances of sex abuse or sexual exploitation of a minor by defendant, whether or not it occurred during the course of this offense, involved the same minor, or resulted in a conviction for that conduct

b. it’s not double counting to give this enhancement *and* count the conviction for criminal history points!

2. § 2G2.2, Note 5 is a special grouping rule for multiple victims of production (exploitation) crime. It requires that multiple counts involving the exploitation of different minors *not* be grouped together under § 3D1.2 (standard grouping rule) – so each minor is treated as if contained in a separate count of conviction, whether or not that conduct was ever charged, tried, or pled!

Example: Defendant Bob is convicted after a guilty plea of taking pictures of his minor niece, A.S., but the prosecutor and USPO have in their file naughty pictures of two other minor nieces, B.S. and C.S., which were allegedly taken by Bob a year earlier.

Bob’s BOL for the count of conviction involving A.S. is 32, plus 2 for age of victim, and 2 because he’s a relative. His final offense level is 36, right? Think again....

The USPO is likely to count, in the PSIR, *each* of the three minors as separate *groups* under this rule. So using § 3D1.2, it’s not one but *three* groups at level 36 *each*...

And under §3D1.4 each one gets a “unit”....with three units, you add 3 levels to his BOL of 36....

So for his *single count of conviction*, Bob now is at *Level 39!*

Query whether this passes Booker & Apprendi muster?

D. Tip: Do NOT make Judge Reade look at the dirty pictures if you can avoid it – the “ick” factor seems to push up sentences.

E. Note re amendment to Guidelines. Effective 11-1-04 (Amendment 664) the child porn guidelines were amended and consolidated. The earlier guidelines were much less draconian. If any of the defendant's relevant conduct could be extended into the "new book" period (i.e. after 11-1-04) the prosecutor and USPO will want to use the later guidelines – beware of this trick when stipulating to facts in plea agreements.

V. SUPERVISED RELEASE

A. Think ahead! In order to preserve error properly, you may have to anticipate the likely supervised release conditions, and object in your sentencing memo or a pre-sentencing brief. See Appendix for an example of supervised release conditions.

B. Some supervised release conditions are mandatory. § 5D1.3(a)

C. Some are discretionary. See §5D1.3(b). Court may impose "other conditions" but only to the extent that they are reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant, etc... (same factors as §3553(a)) Importantly, U.S.S.G. § 5D1.3(b) also "directs that the imposed conditions should not deprive the party of his or her liberty any more than is reasonably necessary for the purposes of Congress and the Commission."

D. Guidelines Sections 5D1.3(c), (d) and (e) set forth additional recommended terms for certain cases.

E. U.S.S.G. § 5D1.3(d)(7) specifically addresses sex offenses – requires court to impose special conditions of supervised release, requiring defendant to participate in sex offender treatment program in BOP, and limiting his computer or online use.

F. Defendant will probably have to register as sex offender. Iowa law requires those convicted of a "criminal offense against a minor" to register as a sex offender. Iowa Code § 692A.2. Possession of child pornography is a "criminal offense against a minor." Iowa Code §§ 692A.1.5.m & o and 728.12.3.

G. Challenges to supervised release.

Where the government offered no evidence that defendant had any propensity to commit future sex offenses, special conditions relating to contact with children were struck down in United States v. Scott, 270 F.3d 632 (8th Cir. 2001). The appellate court found that the conditions were not reasonably related to the underlying offense of bank robbery, and "would not serve the goals of deterrence or public safety."

Similarly, in United States v. Kent, 209 F.3d 1073 (8th Cir. 2000), the appellate court found the district court abused its discretion by imposing a special condition

requiring a mail-fraud defendant to undergo psychological or psychiatric counseling, where the condition was based on the defendant's mental and physical abuse of his family that occurred a distant 13 years before sentencing. The appellate court noted that the government "failed to provide any testimony from a medical expert aimed at addressing Kent's current mental condition," and that a counseling condition was based on a "groundless assumption" that Kent would abuse his wife once he got out prison, even though he has neither physically harmed her nor threatened her in over a decade. "The district court had no reason to believe that psychiatric counseling was necessary."

In United States v. Prendergast, 979 F.2d 1289 (8th Cir. 1992), the Eighth Circuit concluded that the imposed special conditions requiring abstinence from alcohol and drugs, and requiring submission to random drug testing and warrantless searches for alcohol and drugs, had no reasonable connection with the underlying crime of wire fraud. The court noted that there was no evidence indicating that the defendant suffered from alcoholism or that alcohol in any way contributed to the commission of the wire fraud crime, and the district court failed to make any specific findings that alcohol was a contributing cause of the crime or that the defendant otherwise needed drug rehab. See also United States v. Bass, 121 F.3d 1218 (8th Cir. 1997) (same).

See United States v. Crume, 422 F.3d 728 (8th Cir., 2005). Address the issue of the over broad reach of the supervised release conditions. Apparently restricted, due to the constitutional interest, the restrictions that were being imposed by the Court in internet access. Appellate case was followed by U.S. v. Mark, 425 F.3d 505 (8th Cir., 2005). Note that Crume did authorize restrictions upon contacts with minor children, including children of the Defendant. U.S. v. Levering, 441 F.3d 566 (8th Cir., 2006) also restricted contacts with juveniles. U.S. v. Davis, 452 F.3d 991 (8th Cir., 2006); however, recognize that especially when we're looking at contact with defendant's own child, that the Court needed to make an individualized determination of the purposes of the supervised release. Conditions in the U.S. v. Davis case were not sustained and were sent back to the district court for further review.

VI. PRESENTENCE STUDY AND SEX OFFENDER EVALUATION –

A. 18 U.S.C. §§ 3552(b) AND (c)

(b) Presentence study and report by bureau of prisons.--If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is

a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall be no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall, if the defendant is in custody, return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

(c) Presentence examination and report by psychiatric or psychological examiners. If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, the court may order the same psychiatric or psychological examination and report thereon as may be ordered under section 4244(b) of this title.

B. Using the study.

District courts have authority to conduct local studies, in contrast to medical evaluations at Bureau of Prisons medical facility to which defendant is in fact sent, in cases where medical information will be useful in determining sentence to be imposed. United States v. Tsai, 954 F.2d 155 (3rd Cir. 1992) (though the circuit determined it was not abuse of discretion when district court ultimately determined study unnecessary).

Medical and psychological evaluation by Bureau of Prisons (BOP) to determine level of cognitive functioning, and presence or absence of memory problems of defendant convicted for bank fraud was required prior to imposition of sentence; defendant requested downward departures based on alleged cognitive deficits and memory problems, and sentencing court was presented with inconsistent evidence that defendant suffered a stroke that caused serious memory

and health problems, and that he continued to engage in bank fraud scheme after that stroke. United States v. Morehouse, 326 F.Supp.2d 172 (D. Me.2004).

Note: it would be advisable to file a motion for presentence study and sex offender evaluation under seal.

Evaluation may be used to bolster defense theory that although convicted defendant is a "sex offender" he does not suffer from clinical diagnosis of pedophilia and thus need not have restrictions on contact with (for example) non-victim minor family members when in prison or on supervised release. Evaluation may also be helpful to BOP in determining treatment options while defendant is incarcerated, and helpful to USPO in finding additional treatment and support upon release.

VII. CASES

U.S. v. Muga, 394 F.3d 1016 (8th Cir. 2005). Dealt with the local production of child pornography using materials that moved in interstate commerce. Upheld convictions under Title 18 U.S.C. § 2251(a) and § 2252A(a)(5)(B).

Case also has a common thread about the upward departures for understatement of criminal history. (U.S. v. Crume – background cases dealing with the supervised release, and concerns about the constitutionality of these restrictions on defendants.) Includes the 8th Circuit case U.S. v. Ristine, 335 F.3d 692 (8th Cir., 2000) which on the basis of plain error did not reverse the district court. Other Circuits that had reviewed similar conditions and had questioned or not sustained the special supervised conditions include: U.S. v. Holm, 326 F.3d 872 (7th Cir., 2003); U.S. v. Sofsky, 287 F.3d 122 (2nd Cir., 2002); U.S. v. Freeman, 316 F.3d 386 (3rd Cir., 2003); and U.S. v. White, 244 F.3d 1199 (10th Cir., 2001).

U.S. v. Smith, 367 F.3d 748 (8th Cir., 2004); case deals with defining "sexual exploitation of children." This is factor used to increase defendant's sentences after being convicted. Basic premise is that "sexual exploitation of children" crimes are not limited to pornography types of cases.

"Lascivious exhibition of genitals" is an issue at law that comes up frequently. See Horn, 187 F.3d 781 at 789 (8th Cir., 1999). Certainly there are 1st Amendment concerns here in terms of whether items may be prurient but not necessarily obscene; suggestion that the district court should be conducted preliminary review of photographs, especially where they are being offered as "lascivious exhibitions of genitals."

Government may be using a physician to testify as to ages of children, without actually producing actual children.

Also, see U.S. v. Broyles, 37 F.3d 1314, 1317-18 (8th Cir., 1994).

Trial court is authorized to deny access to defendant of copies of the videotapes, and rather authorize that those be reviewed by defendant's expert. See United States v. Horn, (*cite*). The Horn case also has discussion of the guideline issues, including the trafficking/distribution versus possession guideline, and also points out that trafficking and distributing does not require sale, but could be merely a barter or exchange (similar to our drug clients).

U.S. v. Dost, district court case in the Southern District of California, is frequently being cited as the case having the best example of the criteria to be used in determining whether photos constitute "lascivious exhibition." U.S. v. Dost, 636 F.Supp. 828 (S. D. Cal., 1986). The Dost case references New York v. Ferber, 458 U.S. 747 (1982), which stands for the principle that child pornography is outside the protection of the 1st Amendment.

Other cases dealing with the determination of what is lascivious exploitation would include U.S. v. Wiegand, 812 F.2d 1239 (9th Cir., 1987) (quoting from D.H. Lawrence); U.S. v. Wolf, 890 F.2d 241 (10th Cir., 1989). U.S. v. Amirault, 173 F.3d 28 (1st Cir., 1999) is the case you most likely will want to use. This is a case where the conviction was vacated and remanded based on the determination that the photographs should not have been considered to be a "lascivious exploitation." This was in the context of the guideline issue; there is also discussion of the possession versus trafficking in Amirault. Suggestion that the Appellate Court review de novo, in that lasciviousness does not necessarily equate to "nakedness" and "youth." Those factors are not enough by themselves to constitute lasciviousness. Also, U.S. v. Hilton, 257 F.3d 50 (1st Cir., 2001) discussion of some images that were not deemed to be lascivious.

U.S. v. Deaton 328 F.3d 454 (8th Cir. 2003) talks about the need to show an actual child for violation of 18 U.S.C. § 2252(a)(4)(B) and that is not required to have independent proof of a child being under age 12. But see U.S. v. Hilton, 386 F.3d 13 (1st Cir. 2004).

"Real minors" – U.S. v. Ellyson, 326 F.3d 522 (4th Cir., 2003) dealing with the 18 U.S.C. § 2256(8)(B) talks about it's not constitutional to prosecute if the images are not of real minors. Case dealt with jury instructions that fail to comply with the Constitutional principles identified in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) concerns about the question of whether or not images that were "completely computer driven." In Ellyson, Defendant was charged with a violation of 18 U.S.C. § 2252A.

U.S. v. Kimler 335 F.3d 1132 (10th Cir. 2003) talked about fact that government was not required to prove the actual child. Another one of those cases dealing with how the internet crosses state lines. (Is there a difference between cable modem and a telephone line?) Kimler states that Free Speech Coalition did not establish a broad categorical requirement that there must be direct evidence of identity. Cited Deaton.

Guideline cases dealing with sadistic or masochistic conduct. Guideline § 2G2.2(b)(3) no necessity of having expert testimony. See U.S. v. Vig, 167 F.3d 443 (8th Cir., 1999).

Guideline cross referencing issues, whether trafficking or simple possession. See U.S. v. Dodds, 347 F.3d 893 (11th Cir., 2003) set conviction of a client under 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 1462.

Sadistic images. See U.S. v. Belflower, 390 F.3d 560 (8th Cir. 2004) and also other cases, U.S. v. Parker, 267 F.3d 839 (8th Cir., 2001); U.S. v. Stulock, 308 F.3d 922 (8th Cir., 2002); U.S. v. Flower, 216 F.3d 456 (5th Cir., 2000). Images depicting penetration of young child by adult male necessarily involved an act that was violent or painful to the child, qualifying for sadomasochistic/violent enhancement.

Double Jeopardy. Defendants charged with one count of receipt and one count of possession constituting the same events.

The court should be vacating the possession crime conviction. If the receipt crime has been affirmed. See U.S. v. Crume, the Blockburger analysis. U.S. v. Blockburger 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Search and Seizure of Computer Files. Cases of U.S. v. James, 2003 W.L. 22998108 (8th Cir., 2003) – grants authority to consent to search of disk. U.S. v. Carey, 172 F.2d 1268 (10th Cir., 1999). The search was not authorized by warrant, the computer images were not in “plain view” and the consent obtained was not broad enough. Also, U.S. v. Walser, 275 F.3d 981 (10th Cir., 2001). Case stating that the seizure was authorized by the warrant.

APPENDIX

**CHILD
PORNOGRAPHY
AND CHILD
EXPLOITATION
OUTLINE**

addition, Agent Bell took items from the desk in the living room and confiscated a briefcase. On February 21, 2002 Mike Bell returned to this residence and picked up a hard drive. There was a further search on or about February 22, 2002, including search of a closet in the hallway and removal of 50-60 floppy disks, magazines, Polaroid pictures, and additional letters.

3. The admission of any items seized during these various searches and seizures of items from the above described property address, as well as the admission of any statements made by Defendant during and following the search(es), would violate Derrick Crume's rights under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures.

Any statements made by Defendant following the search were obtained as a result of an invalid search, and must be suppressed as the "fruit of the poisonous tree."

The warrantless search, seizure, detention and interrogation were all conducted unlawfully.

The warrantless search, seizure and detention was conducted without reasonable grounds to believe, or without particularized suspicion of any criminal activity.

The warrantless search and seizure was not consented to by the Defendant.

4. All evidence obtained by the illegal search and seizure, and any evidence obtained by subsequent detention and custodial interrogation resulting from the search and seizure, are fruits of the unlawful search and seizure and should be excluded from use at

trial. None of this evidence had a wholly independent source, or cause, or intervening event of such significance as to make it voluntarily given by Defendant.

5. The items of alleged evidence sought to be suppressed by this motion are:

- A. Physical items found and seized during the unlawful searches. This would include, without limitation, (a) computers; (b) components; (c) parts of any computers; (d) any software for computers; (e) any floppy disk or other media for storing data; (f) any photographs, videotapes, or magazines;
- B. The testimony of the officers concerning their observations of the physical items allegedly found during the illegal search and detention;
- C. Any testimony concerning alleged statements or admissions made by the Defendant during and following the searches.

6. Statements by Defendant amounting to admissions or confessions were obtained by interrogation which denied Defendant's right to counsel, and his constitutionally guaranteed privilege against self-incrimination, and Defendant did not knowingly, intelligently, and voluntarily waive those rights provided to him by the Fifth and Sixth Amendments to the United States Constitution.

WHEREFORE, Defendant Derrick Crume respectfully requests that the Court set this matter for hearing, and that after that hearing, grant this motion and suppress all evidence obtained through this illegal search and seizure.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on _____ 2004.

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
 Federal Express Other

Signature: _____

Copy to:

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ATTORNEY FOR DEFENDANT

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

UNITED STATES OF AMERICA,)	
	)	NO. 03-CR-3047-LRR
Plaintiff,)	
)	
vs.)	
	)	DEFENDANT'S BRIEF IN SUPPORT
DERRICK CRUME,	)	OF MOTION TO SUPPRESS
)	
Defendant.)	

Defendant, Derrick Crume, through counsel, has filed a motion to suppress evidence. The Defendant submits this Brief In Support of the Motion:

FACTS

That on or about February 19, 2002 contact was had between Mike Bell and Robert Sutter (Intensive Supervision Agents in Mankato, Minnesota) and Derrick Crume. During the course of this contact various observations were made by Mike Bell regarding a computer, scanner, fax machine and other items in a residence located at 517 N. 2nd Street, Apartment #1, Mankato, Minnesota. On or about February 20, 2002 Agents Mead and Sutor (both from the Intensive Supervision Office in Mankato, Minnesota) returned to the same residence to confiscate a computer. They conducted a

search at this time and confiscated computer, software for the computer, fax machine, scanner, magazines, videotapes and mail. They questioned the Defendant subsequent to the search. In addition, Agent Bell took items from the desk in the living room and confiscated a briefcase. On February 21, 2002 Mike Bell returned to this residence and picked up a hard drive. There was a further search on or about February 22, 2002, including search of a closet in the hallway and removal of 50-60 floppy disks, magazines, Polaroid pictures, and additional letters.

ARGUMENT

III. BECAUSE THE DEFENDANT HAD A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE AND COMPUTER LOCATED AT THE RESIDENCE, HE HAS STANDING TO CHALLENGE THE SEARCH.

A defendant's Fourth Amendment rights cannot be violated by a search unless he has legitimate expectation of privacy in the area searched. *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994). It is clear that Fourth Amendment rights are personal and may not be vicariously asserted. *See, United States v. Payner*, 447 U.S. 727, 731 (1980). Defendants bear the burden of proving a legitimate expectation of privacy. *United States v. Macklin*, 902 F.2d 1320, 1330 (8th Cir. 1990). "To establish a legitimate expectation of privacy, the defendant must demonstrate (1) a subjective expectation of privacy; and (2) that the subjective expectation is one that society is prepared to recognize as objectively reasonable." *United States v. Muhammad*, 58 F.3d 353, 355 (8th

Cir. 1995).

Whether a party has a subjective expectation of privacy depends on several factors. The Eighth Circuit pointed out the following factors are relevant to the determination of standing:

Ownership, possession, and/or control of the area searched or items searched; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.

Gomez, 16 F.3d at 256 (quoting *United States v. Sanchez*, 943 F.2d 110, 113 (1st Cir. 1991)).

[II]. THE ADMISSION OF ANY EVIDENCE OBTAINED AS A RESULT OF THE SEARCH OF THE RESIDENCE AND THE COMPUTER AT THE RESIDENCE SHOULD BE SUPPRESSED BECAUSE IT WAS OBTAINED IN VIOLATION OF HIS RIGHT UNDER THE FOURTH AMENDMENT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

The United States Supreme Court has ruled that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well-delineated exceptions. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). A warrantless search of a house is per se unreasonable, *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980), and absent exigent circumstances or consent, warrantless entry into the home is

impermissible under the Fourth Amendment. *Steagald v. United States*, 451 U.S. 204, 211, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981). Evidence recovered following an illegal entry is inadmissible and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-87, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963). In the present case, the government can show no exceptions to validate the warrantless entry into the residence and the computer at the residence.

The existence of consent to a search is not lightly to be inferred. *United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir. 1979). The government always bears the burden of proof to establish the existence of effective consent. *Schneckloth v. Bustamonte*, 417 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 794 (1968). That burden is heaviest when consent would be inferred to enter and search a home, for protection of the privacy of the home

finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their...houses...shall not be violated." That language unequivocally establishes the proposition that "[A]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, [81 S.Ct. 679, 682]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

Payton v. New York, 445 U.S. at 589-90, 100 S.Ct. at 381-82.

CONCLUSION

All evidence obtained directly or indirectly from the search and seizure in this case should be suppressed.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on _____, 2004

By: U.S. Mail Facsimile
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Signature: _____

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

UNITED STATES OF AMERICA,

*

Plaintiff,

*

NO. 03-CR-3047-LRR

vs.

*

**DEFENDANT'S SECOND MOTION TO
SUPPRESS EVIDENCE AND REQUEST**

DERRICK CRUME,

*

FOR EVIDENTIARY HEARING

Defendant.

*

Defendant, Derrick Crume, by and through counsel, moves to suppress evidence obtained through an illegal search and seizure. In support of this motion, Defendant states:

1. Derrick Crume has been charged with violations of 18 U.S.C. §2252A(a)(2)(A) and 18 U.S.C. §2252A(a)(5)(B).

2. That on or about March 7, 2003 Sheila Wild had contact with members of the Mason City Police Department and/or the United States Postal Office employees. During the course of this contact she "consented" to the delivery of one certain computer, that being a Hewlett Packard Pavillion 533W, bearing serial number MX23812686. There may also have been other peripheral devices to that computer, along with media storage items that she "consented" to the delivery of to law enforcement agents.

3. Subsequent to the date of receipt of these items, law enforcement agents have made a search and seizure of the contents of the computer. This search and seizure was conducted without obtaining any search warrant, or without the apparent review by any

independent magistrate of the extent and scope of the allowable review of this computer. This computer was purportedly a shared computer, which had individual user identities and passwords established. In addition, as a result of the search and seizures, law enforcement agents have made copies of materials that they have reviewed and have also conducted follow up interviews and obtained statements of the Defendant as a result of this search and seizure.

4. The admission of any items seized during these various searches and seizures of items from the above described property, as well as the admission of any statements made by Defendant during and following the search(es), would violate Derrick Crume's rights under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures.

Any statements made by Defendant following the search were obtained as a result of an invalid search and seizure, and must be suppressed as the "fruit of the poisonous tree."

The warrantless search, seizure, detention and interrogation were all conducted unlawfully.

The warrantless searches and seizures were not consented to by this Defendant.

5. All evidence obtained by the illegal searches and seizures, and any evidence obtained by subsequent detention and custodial interrogation resulting from the searches and seizures, are fruits of the unlawful search and seizure and should be excluded from use

at trial. None of this evidence had a wholly independent source, or cause, or intervening event of such significance as to make it voluntarily given by Defendant.

6. The items of alleged evidence sought to be suppressed by this motion are:

A. Physical items found and seized during the unlawful searches and seizures.

This would include, without limitation, (a) computers; (b) components; (c) parts of any computers; (d) any software for computers; (e) any floppy disk or other media for storing data; (f) any photographs, videotapes, or magazines; (g) any "data or images" that are contained on a hard drive or other memory devices;

B. The testimony of the officers concerning their observations of the physical items allegedly found during the illegal search and detention;

C. Any testimony concerning alleged statements or admissions made by the Defendant during and following the searches;

D. Any duplicate copies of hard drives or other storage media, along with any and all testimony about the analysis of the materials contained on any of the above listed items.

WHEREFORE, Defendant Derrick Crume respectfully requests that the Court set this matter for hearing, and that after hearing, grant this motion and suppress all evidence obtained through this series of illegal searches and seizures.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on _____, 2004.

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
 Federal Express Other

Signature: _____

Copy to:

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Defendant.)	

Defendant, Derrick Crume, through counsel, has filed a motion to suppress evidence. The Defendant submits this Brief In Support of the Motion:

FACTS

That on or about March 7, 2003 contact was had between Sheila Wiles and members of the Mason City Police Department. During the course of this contact Sheila Wiles is reported to have "consented" to the delivery of various tangible items, including a Hewlett Packard Pavillion CPU and related peripheral devices, and also various data or media storage items, such as floppy disks or zip disks. Without obtaining any search warrant, a preliminary search of this computer and its hard drive was conducted by law enforcement officers. Subsequently the items were taken to the

Mason City Police Department and held. On or about March 28, 2003 postal inspector Kevin Marshall secured the release of these items to his custody. He subsequently had those forwarded for a "forensic laboratory analysis" which request was made on or about April 22, 2003. On or about May 28, 2003 a report setting forth the analysis of the seized items (lab report and file directory) was issued. There have been subsequent searches and seizures of this computer, including an October 6, 2003 request for computer forensic analysis which generated an October 14, 2003 report. Throughout all of this time period the Government has apparently held these items, but has never sought or obtained any search warrants. Throughout this time period the Government agents have had knowledge that this computer, purported to be used by the Defendant, Derrick Crume, would by its very nature potentially contain Mr. Crume's private "documents."

The searched portions of the computer would apparently include a Kaaza file. This is a software program that by being downloaded to a computer allows users of the computer to access the Kaaza website and to view and/or obtain files or images that are posted at the Kaaza site. In establishing the Kaaza files, individuals establish both a user name and a password. This is for the security and privacy of the user. It is believed that there would have been two separate Kaaza files, including one that would have been established for Mr. Crume, and which had Mr. Crume's password. Search of

the computer was conducted such that the password protection of the Kaaza file was avoided. This constitutes the illegal search and seizure of materials that Mr. Crume had a legitimate interest in and expectation of privacy.

ARGUMENT

II. BECAUSE THE DEFENDANT HAD A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE AND COMPUTER LOCATED AT THE RESIDENCE, HE HAS STANDING TO CHALLENGE THE SEARCH.

A defendant's Fourth Amendment rights cannot be violated by a search unless he has legitimate expectation of privacy in the area searched. *United States v. Gomez*, 16 F.3d 254, 256 (8th Cir. 1994). It is clear that Fourth Amendment rights are personal and may not be vicariously asserted. *See, United States v. Payner*, 447 U.S. 727, 731 (1980). Defendants bear the burden of proving a legitimate expectation of privacy. *United States v. Macklin*, 902 F.2d 1320, 1330 (8th Cir. 1990). "To establish a legitimate expectation of privacy, the defendant must demonstrate (1) a subjective expectation of privacy; and (2) that the subjective expectation is one that society is prepared to recognize as objectively reasonable." *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995).

Whether a party has a subjective expectation of privacy depends on several factors. The Eighth Circuit pointed out the following factors are relevant to the

determination of standing:

Ownership, possession, and/or control of the area searched or items searched; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.

Gomez, 16 F.3d at 256 (quoting *United States v. Sanchez*, 943 F.2d 110, 113 (1st Cir. 1991).

Recent 8th Circuit authority would support Defendant's position. See, *United States v. James*, 2003 WL 22998108 (8th Cir., Missouri, December 23, 2003). In addition, the case of *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir., 2001) cited in the *James* case further addresses the issue of lack of authority to search personal files on a shared computer when an individual has evidence a privacy interest in protecting the files with a password.

[III]. THE ADMISSION OF ANY EVIDENCE OBTAINED AS A RESULT OF THE SEARCH OF THE RESIDENCE AND THE COMPUTER AT THE RESIDENCE SHOULD BE SUPPRESSED BECAUSE IT WAS OBTAINED IN VIOLATION OF HIS RIGHT UNDER THE FOURTH AMENDMENT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

The United States Supreme Court has ruled that searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well-delineated exceptions. *Minnesota v. Dickerson*, 508 U.S. 366, 113

S.Ct. 2130, 124 L.Ed.2d 334 (1993). A warrantless search of a house is per se unreasonable, *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980), and absent exigent circumstances or consent, warrantless entry into the home is impermissible under the Fourth Amendment. *Steagald v. United States*, 451 U.S. 204, 211, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981). Evidence recovered following an illegal entry is inadmissible and must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-87, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963). In the present case, the government can show no exceptions to validate the warrantless entry into the residence and the computer at the residence.

The existence of consent to a search is not lightly to be inferred. *United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir. 1979). The government always bears the burden of proof to establish the existence of effective consent. *Schneckloth v. Bustamonte*, 417 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 794 (1968). That burden is heaviest when consent would be inferred to enter and search a home, for protection of the privacy of the home

finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their...houses...shall not be violated." That language unequivocally establishes the proposition that "[A]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, [81 S.Ct. 679, 682]. In terms that apply equally to seizures of

property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.

Payton v. New York, 445 U.S. at 589-90, 100 S.Ct. at 381-82.

Even when a consent to search is given to a department, that does not necessarily extend to the contents of a computer file. *See, United States v. Carrey*, 172 F.3d 1268 (10th Cir., 1999). Further, images in closed files are not in "plain view," and thus do require prior review by an independent magistrate and the securing of a search warrant before search and seizure of the images can be had.

CONCLUSION

All evidence obtained directly or indirectly from the search and seizure in this case should be suppressed.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on _____, 2004

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
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Signature: _____

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

UNITED STATES OF AMERICA,)	
	)	NO. 03-CR-3047-LRR
Plaintiff,)	
)	
vs.	)	DEFENDANT'S SUPPLEMENTAL
	)	BRIEF IN SUPPORT OF MOTIONS
DERRICK CRUME,	)	TO SUPPRESS EVIDENCE
)	
Defendant.)	

There are two steps in a search and seizure of computerized information, each of which must comply with the Fourth Amendment:

1. The search for and (possible) seizure of the hardware or other media (e.g., floppy disks) upon which the information described in the warrant is believed to be stored; and
2. The search for and the seizure of the particular files or data specified in the warrant.

A computer may be seized because it itself is evidence, fruits or contraband; e.g., one used by a hacker or to create child pornography. However, because there is some expectation of privacy of the contents separate from that in the computer itself, a warrant or an exception to the warrant requires that it authorizes the

seizure of a computer will not support a search of its contents. See, United States v. Carey, 172 F.3d 1268, 1274 (10th Cir.) Rehearing denied, 172 F.3d 1268 (10th Cir. 1999); United States v. Turner, 169 F.3d 84 (1st Cir. 1999); United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995); United States v. Blas, 1990 W.L. 265179, 19-21 (Eastern District of Wisconsin, December 12, 1990).

Making a mirror image of a computer hard drive is a "seizure" and although it may not involve viewing the information, the subsequent viewing of the hard drive or mirror image should be authorized by a magistrate. See, Searching And Seizing Computers And Obtaining Electronic Evidence In Criminal Investigations, January, 2001, App. F., Part II (C)(2) (Department of Justice Policy and Manual). Failure to secure warrants for review of the content would constitute search and flagrant disregard of the warrant requirement. See, Searching And Seizing Computers, 2001, Part III(B)(1)(b) (Department of Justice Policy & Manual).

The obtaining of intangible information, such as computer files and data, constitutes a seizure for Fourth Amendment purposes. This would include when the Government copies, reports, saves, writes or prints from the existing location to another medium. Thus, recording conversations or verbatim copies or taking notes of film or video and sound recording have constituted seizures. See, Berger v. State of New York, 388 U.S. 41, 59-60 (1967). The Courts have interpreted the acts of government agents in

copying computer data as a "seizure." *See, United States v. Jwrysiak*, 972 F.Supp. 853, 865-66 (D.N.J. 1997); *United States v. David*, 756 F.Supp. 1385, 1389, 1392-93 (D.Neb. 1991). Seizure of computer book did not authorize subsequent invasion of privacy by search. These seizures and subsequent searches need to be pursuant to a warrant, or to an exception to the warrant requirement and supported by appropriate follow up.

The search and seizure should also be viewed in the context whether the technical search methodology minimized the possibility for unwarranted intrusions on privacy. *See, Andresen v Maryland*, 427 U.S. 463 at 482, Note 11; 96 S.Ct. 2737, 49 L.Ed.2d 629 (1976). Failure to use such means can result in the search being considered to be over-broad and a flagrant disregard of the search warrant requirement.

Technical means are available for the Government to confine search to the scope of probable cause, including searches by:

- File name;
- Directory or subdirectory;
- Name of sender or recipient of e-mail;
- Specific keywords or phrases;
- Particular types of files as indicated by file name extension; and/or
- File date and time.

See, analysis in United States v. Walser, 275 F.3d 981, 986 (10th Cir. 2001); *Carey, supra* 172 F.3d at 1273; and *United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999).

The analogy should be that individual files in a computer are like individual file folders containing paper documents. These contents are not generally

exposed to public view and are subject to a reasonable expectation of privacy. *See*, United States v. Knoll, 16 F.3d 1313, 1320-21 (2nd Cir. 1994). The Government needs to have probable cause to open and view certain computer files. *See*, United States v. Barth, 26 F.Supp.2d 929, 936-937 (W.D. Tex., 1998). Putting files on a hard drive of a computer manifests a reasonable expectation of privacy in contents of files. *Id.*

Probable cause would depend on the nature and attributes of the particular file. Walter v. United States, 447 U.S. 649 at 657, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980). There may exist probable cause to search for certain files created by user, but not cache files or swap files, which the computer itself might download or maintain. Distinctions like these should dictate the search methodology, the scope of search and the extent of exceptions to the warrant requirement. *See*, United States v. Maxwell, 45 M.J. 406, 421-23 (U.S. Armed Forces, 1996) (e-mail message subject of the warrant); New York v. Carratu, 2003 W.L. 230674, 755 N.Y.S.2d 800 (N.Y.S., January 23, 2003). (Warrant authorizing search for documentary evidence relating to illegal cable operation did not authorize search of file unambiguously labeled with file name extension indicating containing images, thus defeating application of "in plain view" document.)

The institution of a warrant requirement would have restricted the time and scope of the search. Federal Rule 41. Since no warrant was ever obtained, the Government has been in a position of making multiple and repeated searches without

having to report in any fashion to the Court the scope of its search, what items have been seized, much less return of those items.

The consent issue in this case amounted to a consent to seize a computer. This does not authorize the opening of files within the computer. *See Carey*, 172 F.3d at 1274. Furthermore, the user of a shared computer has no authority to consent to a search of a co-user's password protected files. Such files are analogous to a locked foot locker in a shared home. *See Turlock v. Freeh*, 275 F.3d 391, 402-03 (4th Cir. 2001).

The question is what sort of audit log has been maintained by maintaining an audit log. The Court would be in a position of determining how images were made and how many have been stored to the hard drive and when. This could be done through either SafeBack™ and EnCase™ and FTK™. Again, these would be factors to be used in determining whether this has been an over-broad and general search that was not previously approved by any search warrant and which had constituted violations of Defendant's Fourth Amendment rights.

CONCLUSION

Defendant further asserts that the search of computer files and the seizing of data files and reviewing of those have constituted gross violations of the Defendant's Fourth Amendment rights to be free from unreasonable searches and seizures, and that

all evidence obtained as a result thereof should be suppressed and ruled inadmissible in the pending trial.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on _____, 2004

By: U.S. Mail Facsimile
 Hand Delivered Overnight Courier
 Federal Express Other

Signature: _____

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*
Derrick Crume
c/o Benton County Correctional Facility
113 E. 3rd St.
Vinton, IA 52349

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DERRICK CRUME

Defendant.

*

03 CR 3047 LRR

*

*

**DEFENDANT'S MOTION
TO DISMISS**

*

*

COMES NOW the above named Defendant, by and through his counsel, and does hereby move to dismiss Count I of the indictment (Second Superceding Indictment), and in support of this Motion, states as follows:

1. The Defendant has been charged with two counts. In Count I he is being charged with the violation of 18 U.S.C. §2252A(a)(2)(A). In Count II he is charged with the violation of 18 U.S.C. §2252A(a)(5)(B). The conduct covered by both Counts is the same conduct. Moreover, the conduct does not rise to a level more than "mere possession."

2. Furthermore, in the event that this matter proceeds to trial, should the Defendant be convicted of both Counts I and II he would be twice penalized for the same offense.

3. Believe that there are due process and double jeopardy violations that are posed by the present indictment, in violation of Article 5 of the United States Constitution.

4. A memorandum in support of this Motion will be filed. This Motion is filed late. It is filed upon the counsels recent discovery of authority, cited in the brief, which forms the basis for this argument. Furthermore, many of these issues may be raised during the trial upon motions that may be made by the Defendant at the close of Government's evidence.

WHEREFORE, Defendant prays that Count I of the Second Superceding Indictment be dismissed at this time, or at the conclusion of the Government's evidence in this case.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on March 15, 2004.

By: U.S. Mail Facsimile
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DERRICK W. CRUME

Original Filed with Court.

Copy to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DERRICK CRUME

Defendant.

*

03 CR 3047 LRR

*

* **DEFENDANT'S MEMORANDUM
OF LAW IN SUPPORT OF
MOTION TO DISMISS**

*

COMES NOW the above named Defendant, by and through the undersigned counsel, and in support of his Motion To Dismiss provides the Court with the following memorandum of law:

1. The facts that the Government relies upon in establishing violations of both the subject statutes are set forth in the Government's Resistance To Defendant's Motion To Suppress Evidence (pages 5 through 6) "The Iowa Consent Search," along with the summary of the Government's pretrial opening statement as set forth on pages 4 and 5 of the United States Trial Memorandum.

LAW

The question that these statutes and the facts in this case poses is the meaning and scope of the word "receives." The undersigned has recently reviewed a case from the United States District Court For The Northern District of Illinois that suggests that a thorough analysis of the statutory history of §2252A(a)(2) would suggest that the word "receives" has been used in the statutory history for a broader sense than "mere possession." In case of United States of America v. David Malik, 282 F.Supp.2d 833 (N.D. of Illinois, Eastern Division, July 1, 2003), the District Court made a detailed analysis of that history and concluded that this did not "reflect any congressional intention to subject the identical conduct on the part of a defendant that constituted his or her mere possession of such materials...just because material had come into that defendant's *possession* as the necessary consequence of his or her having *received* it. (The Analysis contained in that case is adopted by this

Defendant.) In that case, a defendant had plead guilty to both a violation of 18 U.S.C. §2252A(a)(2)(A) and §2252A(a)(5)(B). The Court found that the acceptance of the prior guilty plea to the first count would be reduced to a plea to the lesser offense. This also meant that the Guidelines to be applied would be those Guidelines set forth in §2G2.4 of the United States Sentencing Guidelines and not those set forth in §2G2.2. The Court noted that it was unaware of any reported decisions that had made the analysis of how the term “receives” had been incorporated in the current language of 18 U.S.C. §2252A(a)(2)(A). Thus, the Court in that case believed that it was following the directions of Congress and defining Congress’s intent in applying the facts to those indictments. We have a similar situation in front of us.

Certainly Defendant’s position is not without controversy. The District Court in Malik makes reference to the case of United States v. Sromalski, 318 F.3d 748 (7th Cir. 2003). That case dealt only with an information charging a violation of 18 U.S.C. §2252A(a)(5). The question in that case was whether to apply §2G2.2 and §2G2.4 to the facts of that particular case. There is dicta in that case about an “automatic” application of §2G2.2 to a violation of crimes involving receipt.

Further, in the 7th Circuit there is the case of United States v. Myers, 355 F.3d 1040 (7th Cir. January 22, 2004). In that case the 7th Circuit was dealing with a violation of 18 U.S.C. §2252(a)(2) and 18 U.S.C. §2252(a)(4)(B). The Court concluded that possession and receipt are not the same conduct. However, the Court in that case does not undertake any detailed analysis of the history of the statute to determine how the phrase “receives” has been incorporated into the present language of 18 U.S.C. §2252A(a)(2). The Court in United States v. Myers did note that the Supreme Court has recognized that crimes involving receipt of child pornography include a scienter requirement. See, United States v. X-Citement Video, Inc., 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2 372 (1994) (dealing with a violation of 18 U.S.C. §2252(a)(2).)

In conclusion it is respectfully urged that the statutory construction that is described in United States v. Malik is an appropriate construction of the statute. To the extent that the Government has not or does not prove more than "mere possession," there should be a dismissal of Count I of this indictment.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, to each of the attorneys of record herein, at their respective addresses disclosed on the pleadings on March 16, 2004.

By: U.S. Mail Facsimile
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Signature: s/ Gwen Lewis

s/ Stephen A. Swift

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Copy to:

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4. Defendant should not be sentenced on both Counts I and II. To do so would violate Defendant's right to be free from duplicative punishment for the same offense in violation of the Fifth Amendment to the Constitution of the United States.

5. Conviction on both crimes of receipt and possession offenses in this situation do constitute twice being put in jeopardy of life. The Court should find that the possession offense shall be found to be a lesser included offense of the crime of receipt.

6. Defendant will be filing a brief in support of this motion.

WHEREFORE, Defendant prays that the Court find that punishment for both Counts I and II would constitutionally duplicate punishment for the same offense in violation of the Fifth Amendment to the United State Constitution, Count II's conviction should be vacated.

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ATTORNEY FOR DEFENDANT,
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CERTIFICATE OF SERVICE

I hereby certify that on _____, 2004, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

SEAN BERRY, U.S.A.O.

By: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

DERRICK CRUME)

Defendant.)

03-cr-3047 LRR

**BRIEF IN SUPPORT OF
MOTION TO VACATE CONVICTION
OR TO DISCHARGE CONVICTION**

COMES NOW the above named Defendant, by and through the undersigned counsel, and provides the Court with the following Brief In Support Of Motion To Dismiss Count Or Discharge Conviction:

FACTS

Defendant has been found guilty by jury of Count I and Count II of a Second Superceding Indictment filed February 5, 2004. Count I charged that the Defendant "in or about early 2003" knowingly received and attempted to receive visual depictions of minors engaged in sexually explicit conduct, said visual depictions having been transported in interstate and foreign commerce by means of computer. This was in violation of §2252A(a)(2)(A). Count II charged the Defendant with "in or about early 2003" possessing and attempting to possess visual depictions of minors engaged in sexually explicit conduct, said visual depictions having been produced using materials that had been shipped or transported in interstate and for commerce. This was in violation of 18 U.S.C. §2252A(a)(5)(B). The jury found the Defendant guilty of both

Counts, being on Verdict Form Count I and Count II, and in terms of the Interrogatories, found that the Defendant had received Exhibits 1.1 through 1.4A, and that he had also possessed the same exhibits. The jury, in Interrogatory No.3, concluded that a number of the exhibits depicted child pornography. The jury did not find Exhibits 1.9, 1.10, 1.11, 1.13, 1.14, 1.18, 1.27, or 1.39 to be depictions of child pornography.

Prior to trial Defendant had filed Motion To Dismiss, asserting that Count I of the indictment should be dismissed, and asserting that if he was convicted of both Counts I and II he would be twice penalized for the same offense. Docket Entry No. 89.

DOUBLE JEOPARDY

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb" U.S. Const. amend. V. The issue presented in the present Motion is one of Double Jeopardy. The undersigned asserts that the indictments, convictions and now sentencing of Defendant on one count of receiving child pornography and one count of possessing child pornography are actually two indictments, convictions and sentences for the same offense, one being a lesser included offense of the other, in violation of the 5th Amendment to the United States Constitution.

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), established the principle that in applying the double jeopardy clause of the United States Constitution one must determine whether the individual acts are, or the course of action which they constitute is prohibited. If it is the individual acts, then each act may be punished separately, but if it is the course of conduct, there can be only one penalty. Further, in determining whether two statutes covered the same conduct, the Court noted

that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, citing Gavieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911).

In Ball v. United States, 470 U.S. 856, 861-865, 105 S.Ct. 1668, 1671-1674, 84 L.Ed.2d 740 (1985), the Court concluded that Congress did not intend to allow punishments for both illegally "receiving" and illegally "possessing" a firearm. In that case, the only remedy consistent with congressional intent was to vacate one of the underlying convictions and its concurrent sentence based on the idea that the second conviction may have potential adverse collateral consequences, including delay of parole eligibility or increased sentences under a recidivist statute for future offenses. *Id.* In the Ball case, the Court noted that statutes directed at receipt and possession amount to the same offense, and that "proof of illegal receipt . . . necessarily includes proof of illegal possession." *Id.* at 862 (emphasis in original).

The question is whether receipt of these images and possession of these images constitutes separate and distinct crimes. Note that in the charging document, the language covers the same time frame and would suggest a continuing time frame, i.e., it did not specify or identify a particular date or incident that could constitute a separate crime. In addition, the evidence offered regarding the receipt and possession was the same exhibits. Count II did not require any fact be proven that Count I did not, therefore, Count II is a lesser included offense of Count I and the conviction on Count II must be vacated.

The Eighth Circuit has held that Missouri's first degree tampering crime can be a lesser included offense to the stealing under Missouri law. McIntyre v. Caspari, 35 F.3d 338 (8th Cir, 1994). The court reviewed the lengthy history of the Supreme Court in attempting to adopt "workable rules" to apply the Double Jeopardy Clause. The court concluded that its focus must be on whether each offenses contained an element not contained in the other, citing U.S. v. Dixon, 509 US 688, - - -, 113 S.Ct. 2849, 2864, 125 L.Ed..2d 556 (1993). As in McIntyre, there are not separate elements in each count that would allow both convictions to stand.

In Rutledge v. United States, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996), the Supreme Court reviewed the question of whether conspiracies to distribute controlled substances could constitute a lesser included offense of the crime of continuing criminal enterprise. The Court found that convictions on both counts in that case constituted improper, cumulative, and second punishment, which required that one of the convictions had to be vacated. The Court found that the imposition of special assessments itself could constitute the separate, additional punishment that would violate the constitution prohibition. Title 18 U.S.C. §3013 requires Federal District Courts to impose a \$100 special assessment for every conviction; thus, even if Counts I and II were to be sentenced concurrently, the imposition of a special assessment on each count would violate the U.S. Constitution. As long as § 3013 stands, a second conviction amounts to a second punishment.

The case of United States v. Corona, 108 F.3d 565, 571-72 (5th Cir. 1997), stands for the proposition that a defendant's sentences alone can be duplicative for double jeopardy purposes and that complaint about multiplicity of sentences can be raised for

the first time even on appeal. Again, the focus on the double jeopardy challenge is whether Congress intended a defendant's actions to be subject to the punishments received, or whether Congress' intent to authorize punishment under separate statutes was unclear and thus subject to the *Blockburger* test to determine if there are separate facts or elements that need to be proven. Id. at 572

The undersigned respectfully urges that the Court should only allow conviction and sentence for one of the two counts.

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DERRICK W. CRUME

CERTIFICATE OF SERVICE

I hereby certify that on _____, 2004, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

SEAN BERRY, U.S.A.O.

By: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DERRICK CRUME

Defendant.

*

03 CR 3047 LRR

*

*

**DEFENDANT'S SENTENCING
MEMORANDUM**

*

*

COMES NOW the above named Defendant, by and through the undersigned counsel, and provides the Court with the following Sentencing Memorandum relating to issues that will need to be resolved at time of sentencing. The issues include:

1. The impact of amendments to United States Sentencing Guidelines and the changes they have made in Sections 2G2.2 and 2G2.4. Specifically, the amendments number 649 (added April 30, 2003) and number 661 (added November 1, 2003).

2. What is the appropriate Guideline to apply, 2G2.2 or 2G2.4?

3. Whether the various specific offense characteristics should be scored against the Defendant. These include potentially:

A. 2G2.2(b)(1) (material involving prepubescent minors or minors under the age of 12);

B. 2G2.2(b)(3) If the material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels;

C. 2G2.2(b)(4) Whether the Defendant engaged in a "pattern of activity" involving the "sexual abuse or exploitation of a minor."

- D. Whether 2G2.2(b)(5) is applicable (computer used for transmission, receipt or distribution... (This is addressed in the issue related to the Amendment No. 661.)
 - E. Whether 2G2.2(b)(6) is applicable. (This relates to the application of Amendment No. 649.)
 - F. Whether the application of Amendment 649 and 661 would constitute violation of the ex post facto clause of the United States Constitution.
4. What are appropriate, constitutionally authorized terms of supervised release?

FACTS

Defendant has been found guilty by jury of Count I and Count II of a Second Superceding Indictment filed February 5, 2004. Count I charged that the Defendant "in or about early 2003" knowingly received and attempted to receive visual depictions of minors engaged in sexually explicit conduct, said visual depictions having been transported in interstate and foreign commerce by means of computer. This was in violation of §2252A(a)(2)(A). Count II charged the Defendant with "in or about early 2003" possessing and attempting to possess visual depictions of minors engaged in sexually explicit conduct, said visual depictions having been produced using materials that had been shipped or transported in interstate and for commerce. This was in violation of 18 U.S.C. §2252A(a)(5)(B). The jury found the Defendant guilty of both Counts, being on Verdict Form Count I and Count II, and in terms of the Interrogatories, found that the Defendant had received Exhibits 1.1 through 1.4A, and that he had also possessed the same exhibits. The jury, in Interrogatory No.3, concluded that a number of the exhibits depicted child pornography. The jury did not find Exhibits 1.9, 1.10, 1.11, 1.13, 1.14, 1.18, 1.27, or 1.39 to be depictions of child pornography.

IMPACT OF AMENDMENTS
TO UNITED STATES SENTENCING GUIDELINES §2G2.2(b)(PARA. 5 & 6)

The charged conduct in the indictment discusses event occurring “in or about early 2003.”

The evidence presented at time of trial focused on the time period in January, 2003. This predates Amendment No. 649 to the United States Sentencing Guidelines, which was effective April 30, 2003.

Section 1B1.11 directs the Court to use the Guidelines Manual in effect on the date the Defendant is sentenced. However, subsection (b)(1) addresses the potential constitutional issues.

That section provides:

If the Court determines that the use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

U.S. Sentencing Guidelines § 1B1.11(b)(1) (2003).

In the Commentary, the Commission noted that Courts have generally held that “the...ex post facto clause does apply to sentencing guideline amendments as subject to defendant to increased punishment.” For Eighth Circuit case authority supporting this position see United States v. Frank, 354 F.3d 910, 926–27 (2004); see also United States v. Valladares, 304 F.3d 1300, 1302 (2002).

Amendment 649 amended Sections 2G2.2(b) and Section 2G2.4(b). In essence, Section 2G2.2(b) was amended to add subsection 6, describing enhancements for numbers of images that are involved in the offense. Section 2G2.4(b) was amended to include paragraphs 4 (“if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increased by 4 levels”), and paragraph 5 (increasing Guideline range for number of images involved in the offense).

As the Defendant's conduct occurred prior to Amendment 649 taking effect, and applying the Amendments would enhance the Defendant's sentence, the undersigned respectfully urges that the applying of these Sentencing Guidelines to the Defendant's current situation would constitute violations of the ex post facto clause of the United States Constitution.

APPROPRIATE GUIDELINE IS 2G2.4

Section 2G2.4 was added to the Federal Sentencing Guidelines in 1991 via Amendment 372. The amendment states that the section was added "to address offenses involving receipt or possession of materials depicting a minor engaged in sexually explicit conduct, as distinguished from offenses involving trafficking in such material, which continue to be covered under § 2G2.2. U.S. Federal Sentencing Guidelines, Appendix C, Amendment 372 (2003). While section 2G2.4 references section 2G2.2, such reference is only meant to be applied in cases "involving receipt or transportation of such material for the purpose of trafficking . . ." *Id.*

Additionally, a Court has found erroneous the application of the Sentencing Guideline provisions relating to trafficking rather than the Guidelines relating to possession where the offense of conviction was the possession offense, and there was no evidence that the Defendant had bought, sold, traded, bartered, or exchanged child pornographic materials with other individuals with an intent to traffic in those materials. *See, U.S. v. Holm*, 326 F.3d 872, Petition For Certiorari filed 2003, WL 21692987 (Court of Appeals 7th, IL, 2003).

In this case, the government failed to put forth any evidence that the Defendant meant to engage in trafficking of the materials he received and/or possessed. Hence, the Court should not apply the cross-reference from § 2G2.4 to § 2G2.2. This makes § 2G2.4 the controlling guideline.

SENTENCING GUIDELINES ENHANCEMENT ISSUES

Prepubescent Minors

There is no requirement of independent proof that images involved actual children under age 12, as the pictures themselves can support determination that images depicted actual children and that the children were plainly under age 12. *See, U.S. v. Deaton*, 328 F.3d 454 (8th Cir., Ark., 2003). The term prepubescent was not void for vagueness where the Government has provided copy of films and proffered an inspector's opinion that at least one child in the film was under the age of 12 and where there was further no evidence that children in the films had reached puberty or that would have lead Defendant to believe the children had reached puberty. *See, U.S. v. Marquardt*, 949 F.2d 283 (9th Cir. 1991). Conduct portraying painful, coercive, abusive, or degrading images can qualify as "sadistic or violent" within the meaning of these Sentencing Guidelines. *See, U.S. v. Lyckman*, 235 F.3d 234 (5th Cir. TX, 2000) *cert. denied* 121 S.Ct. 1634, 532 U.S. 986, 149 L.Ed.2d 494 (Year). The Eighth Circuit has found that images depicting sexual penetration by a minor girl upon herself by using a large carrot, forced oral sex, an adult male ejaculating into the face and open mouth of a crying baby, and adult males standing over and urinating in the face of a female child, were sufficiently painful, coercive, abusive and degrading to be "sadistic and violent" warranting the enhancement. *See, U.S. v. Parker*, 267 F.3d 839 (8th Cir. Ark. 2001).

Pattern of Activity Involving Minors

It has been found that prior conduct, unrelated to the charged offense, in taking sexually explicit photographs of a minor daughter on one occasion, and causing another man to do so on another occasion, along with Defendant's prior sexual abuse of his daughter and sister, could constitute a pattern of activity involving matters. *United States v. Neilssen*, 136 F.3d 965 (Court

of Appeals 4th, N.C., 1998). However, the a District Court in a different circuit held that since an earlier conviction for sexual abuse of a minor was not similar to trafficking in child pornography, the two incidents did not constitute a pattern of conduct. United States v. Canada, 921 F.Supp. 362, 366–67 (E.D.La. 1996).

Transmission

Sentencing Guideline enhancement for using computer in a “transmission” of child pornography upheld where Defendant had received e-mail offer of videotape and then mailed check and received delivery of videotape through Postal Service. The enhancement, unlike separate enhancement pertaining to possession, was not limited to defendants who used computers to advertise child pornography. U.S. v. Stulock, 308 F.3d 922 (8th Cir., MO, 2002).

The enhancement “used for transmission” has been held to cover defendants who receive as well as send child pornography if a computer was used in the transmission process. U.S. v. Richardson, 238 F.3d 837 (Court of Appeals 7th, IL, 2001) *cert. denied* 121 S.Ct. 2206, 532 U.S. 1057, 149 L.Ed.2d 1035, Post Conviction Relief dismissed 2002 WL 1777269.

ISSUES OF CONDITIONS OF SUPERVISED RELEASE

The Court has wide discretion in imposing the terms and conditions of supervised release. United States v. Bass, 121 F.3d 1218, 1223 (8th Cir. 1997); United States v. Schoenrock, 868 F.2d 289, 291 (8th Cir. 1989). The Court’s discretion is limited by statutory provisions of 18 U.S.C. §3553(a)(1), (a)(2)(B)-(D), along with U.S.S.G. §5D1.3(b). The conditions imposed shall not “involve a ‘greater deprivation of liberty than is reasonably necessary’ to effectuate the goals of Congress and the Sentencing Commission.” United States v. Prendergast, 979 F.2d 1289, 1293 (8th Cir. 1992), citing 18 U.S.C. §3583(d)(2). Conditions must be “fine-tuned” if they

restrict the freedom of persons on probation or supervised release. United States v. Tolla, 781 F.2d 29, 34 (2nd Cir. 1986).

Cases involving abuse of discretion include United States v. Kemp, 209 F.3d 1073 (8th Cir. 2000) and United States v. Scott, 270 F.3d 632 (8th Cir. 2001). A case where the Court has been found not to have abused its discretion include United States v. Weiss, 328 F.3d 414 (8th Cir. 2003).

The Court is well familiar with the case of United States v. Henkel, 358 F.3d 1013 (8th Cir. 2004). The reviewing Court noted that where terms and conditions of supervised release are not objected to, the review is for "plain error." Likewise, the same standard of review was applied in United States v. Ristine, 335 F.3d 692 (8th Cir. 2003). In United States v. Ristine, the Eighth Circuit Court of Appeals held that a condition requiring defendant to obtain his probation officer's permission before owning a computer and banning the defendant from having Internet access was not plain error. In that case, the defendant did not object to the conditions at sentencing, so the Appellate Court reviewed the conditions set by the District Court only for "plain error." *Id* at 694. The Court's statements made clear, however, that the case was only precedent for those cases in which the defendant did not object at time of sentencing. The question of whether such condition is reasonable is still undecided in the Eighth Circuit. *Id*. The Court stated it would not rely on the two cases the defendant cited, because in one the defendant had objected to the conditions at time of sentencing, and in the second, the Second Circuit had relaxed the standard of review, even though the defendant had not objected to the conditions at sentencing.

It has been found that conditions of supervised release prohibiting defendant convicted of receiving child pornography, from accessing a computer or the Internet without his probation

officer's approval was an unconstitutional restriction and exceeded the broad discretion of the sentencing judge with respect to conditions of supervised release. United States v. Sofsky, 287 F.3d 122 (Court of Appeals 2nd, New York, 2002). United States v. Holm, 326 F.3d 872 (2nd Cir. 2003), United States v. Scott, 316 F.3d 733, United States v. Freeman, 316 F.3d 386, and United States v. White, 244 F.3d 1199.)

Defendant is concerned the Court may adopt terms of supervised release on conditions that may be either over broad and/or vague. The Court is requested to consider such options as requiring the Defendant to have installed computer software that would act as filters that would prohibit the Defendant from having access to child or other pornography, along with installing appropriate software that would monitor usage that the Defendant has made of the computer and/or Internet access. Usage of these sort of programs may permit and allow the Defendant to have appropriate computer usage, while allowing the Court to establish appropriate boundaries to safeguard the community and to prevent the Defendant from committing additional offenses. In light of the extensive involvement that computers now have in modern day life (whether as employer, employee, consumer, personal communication, etc.), the Court needs to draw careful lines to address the harm to be prevented without harming the Defendant's rights to participate in the modern world, along with interfering with the Defendant's lawful First Amendment rights. Types of software options would include programs such as Bulldog, Cyber Sentinel, Guard Dog, NetNanny, Cyber Sitter, Bsafe Online, and 8e6 Home. Programs such as Bsafe Online and 8e6 Home offer services that emails exact histories of persons' internet activity to other individuals. Attached hereto are brief descriptions of these programs. It is possible that none of these programs will be completely fool-proof. Therefore, having defendants periodically subject hard drives for inspection by probation personnel may be used to supplement software programs.

These may need to be done on a random basis, much as a random urinalysis system is used to detect illegal drug substance usage.

It has been suggested that there are standardized supervised release conditions for sex offenders. The Defendant would note the following standard or previously used language, along with his comments and objections:

“STANDARD – You are prohibited from owning or having in your possession any pornographic materials. You shall neither use any form of pornography or erotica, nor enter any establishment where pornography or erotica can be obtained or viewed.”

The nature of the Defendant’s crime is a commission of child pornography. This prohibition may be overly broad, as it prohibits any pornography, including those items of pornography that might be adult pornography, and which may be subject to lawful possession.

In addition, the definition of pornography should be set forth. The Court may want to prohibit the Defendant from possession of any child pornography as defined in 18 U.S.C. §2256(8) along with the appropriate cross references in 18 U.S.C. §2256.

“STANDARD – You are prohibited from owning or operating any photographic equipment, including, but not limited to, cameras, digital cameras, videotaping recorders, camcorders, computers, scanners, and printers.”

In this case the crime that the Defendant has been convicted of involves images depicted on a computer. Thus, any restrictions here should be related to that item, computers. Furthermore, Defendant would note that an absolute prohibition should not be authorized. Rather, that the Defendant should not be absolutely prohibited, but must make certain that the computers have appropriately installed software that would act as a filter to prevent the receipt of

this sort of child pornography. To otherwise deny Defendant access to computer and also access to the Internet, would unduly infringe upon his economic viability and also his First Amendment rights to communicate with others.

“STANDARD – You shall not have Internet services at your place of residence or employment. Internet services include services to a commercial gateway (e.g., America Online (AOL), Microsoft Network (MSN), and etc., and Internet Service Provider (ISP), and Internet Relay Chat (IRC) channels. You shall not communicate with others via the Worldwide Web (www), Internet Relay Chat (IRC), electronic mail (e-mail), online networks and online news groups and chat groups.”

The above provision would unduly infringe the Defendant’s First Amendment rights in communication with other parties. In addition, it would certainly affect many operations in the everyday economic world. Again, usage of appropriate software programs, along with rights of inspection of the hardware would address the issues of ability to prevent the Defendant from having possession of child pornography.

“STANDARD – You shall have no contact with children under the age of 18 (including through letters, communication devices, audio or visual devices, visits, electronic mail, Internet chat rooms, or any other contact through a third party) without the prior written consent of the probation office.”

It would be suggested that this is overly broad in that it would prohibit the Defendant from having any sort of contact with his own children. If the Defendant does not believe that there is a need to have any sort of written consent from the probation officer regarding contact with his minor children. In the event that the mothers of those children see potential problems,

they are certainly able to petition the appropriate domestic relations court for court review of the appropriate terms of contact of supervision. It is felt that that would be the most appropriate way to address the issues of the Defendant's rights to have contact with his family. Contacts with family members have been recognized by the Courts as fundamental rights under the Constitution, and appropriate consideration of those fundamental rights should preserve the Defendant with some meaningful right to have contact with minor children. The Defendant would note that communications from Michelle Wilkes Stencil have included communications from his daughter, along with communication about his daughter's well being. These have been voluntary communications initiated by Michelle Wilkes Stencil in the past.

“STANDARD – You are prohibited from places where minor children under the age of 18 congregate, such as residences, parks, beaches, pools, daycare centers, playgrounds, and schools without the prior written consent of the probation office.”

This would appear to be overbroad in that it would prohibit the Defendant from being in any residence, as any particular residence could have a minor child. There has been no indication that the Defendant has publicly exposed himself, nor that he has ever assaulted any child at any of these sort of locations. In light of the broad restrictions placed on someone's life, such as the complete prohibition from visiting any park, it is believed that this condition could be viewed as overbroad and unnecessary in light of the circumstances of this particular crime.

In determining the conditions of supervised release, including those specifically related to computer and Internet access, the Court should also keep in mind that the Defendant will most likely have a substantially lengthy term of imprisonment to be served. In light of advances in computer technologies and these safety issues, it is certainly likely that stronger, and perhaps

DEFENDANT: **DERRICK CRUME**
CASE NUMBER: **CR 03-3047-LRR**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : *** 5 years**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

DEFENDANT: DERRICK CRUME
CASE NUMBER: CR 03-3047-LRR

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant shall participate in mental health counseling if deemed appropriate for him by his probation officer, until such time as he is released from the program by his probation officer. This may include participation in a sex offender evaluation and/or a Sex Offender Treatment Program, or any such similar program in the defendant's approved district of residence. The defendant shall pay the costs of participation in these classes.
- * 2) The defendant is prohibited from operating or using photographic equipment to view or produce any form of pornography or child erotica; photographic equipment includes, but is not limited to, cameras, digital cameras, videotaping recorders, camcorders, computers, scanners, and printers.
- * 3) If the defendant possesses a computer, his computer, other personal computers, and electronic storage devices to which he has access, shall be subject to random or periodic unannounced searches by a United States Probation Officer. The search may include examinations of the defendant's computer(s) equipment, the retrieval and copying of all data, and any internal or external peripherals, and/or removal of such equipment for inspection. The defendant shall allow the U.S. Probation Office to install any hardware or software systems to monitor or filter his computer use. Prior to installation or any such hardware or software systems, you shall allow the U.S. Probation Office to examine your computer and/or electronic storage device.
- * 4) The defendant shall not use the Internet at his place of residence, employment, or other location to view any form of pornography or child erotica via the World Wide Web (WWW), a commercial gateway (e.g., American On-line (AOL), Microsoft Network (MSN), and etc.), an Internet Service Provider (ISP), Internet Relay Chat (IRC) channels, or any Internet Protocol address. Further, the defendant shall not communicate with persons under age 18 via the World Wide Web (WWW), Internet Relay Chat (IRC), electronic mail (email), on-line networks, and on-line news groups and chat rooms, without the prior written consent of his probation officer.
- 5) The defendant is prohibited from owning or having in his possession any pornographic materials. The defendant shall neither use any form of pornography or erotica nor enter any establishment where pornography or erotica can be obtained or viewed.
- 6) The defendant shall submit his person, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
- 7) The defendant shall remain in compliance with all requirements of the Sex Offender Registry Program in his approved state of residence throughout the term of his supervision. This may include, but is not limited to, the requirement that the defendant register with the local law enforcement agency that is responsible for policing the area in which he resides and the requirement that he register with his state of residence as a sex offender for as long as required by law in the defendant's state of residence.
- 8) The defendant shall comply with the Sex Offender Risk Assessment and Public Notification Program in his state of residence.
- 9) The defendant shall have no contact with children under the age of 18 during his term of imprisonment and his term of supervised release (including through letters, communication devices, audio or visual devices, visits, electronic mail, Internet chat rooms, or any contact through a third party) without the prior written consent of his probation officer.
- 10) The defendant is prohibited from places where minor children under the age of 18 congregate, such as residences, parks, beaches, pools, daycare centers, playgrounds, and schools without the prior written consent of his probation officer.
- 11) The defendant shall have no direct or indirect contact during his term of imprisonment and his term of supervised release with his prior victim, Michelle (née: Stensel) Wilkes, and her family, in person or at their places of employment, either by telephone, mail, email, through a third-party, or by any other means, without the prior written consent of his probation officer.
- 12) The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as he is released from the program by the probation officer.
- 13) The defendant is prohibited from the use of alcohol and is prohibited from frequenting bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,) NO. CR 04-12
)
vs.)
)
BRION DODD JOHNSON,) **MOTION TO COMPEL DISCOVERY**
)
 Defendant.)

Defendant Brion Dodd Johnson, by and through his attorney, Charles H. Nadler, makes this Motion to Compel Discovery for good cause shown, pursuant to Fed. R. Crim. P. 12(b)(3)(E), 16(a)(1)(E) and 16(d)(2), and the Fifth and Sixth Amendments to the United States Constitution, as follows:

1. The Defendant is charged in a two-count indictment alleging possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), and receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1).

2. This Court and Chief Judge Loken of and for the Eighth have authorized the Defendant to hire a computer forensic expert, because such is necessary in order to effectively prepare a defense for trial, which is currently set for September 7, 2004.

3. Counsel for the Defendant has hired a computer forensic expert at government expense, viz. ISA Forensics, Inc. (2610 South Lynhurst Drive, Indianapolis, IN 46241; (317) 997-2608; FAX: (866) 379-9575).

4. The expert will need to select from the more than 20 hard drives seized, make a forensic review with special attention to at least two of them, and review an undetermined

number of CD-ROMs seized, with special attention to three or four of them, because the child pornography Defendant is alleged to have received and possessed was found on some of those seized items.

5. The expert will need constant and continual access to the exact computer information, data files, and bytes contained on each of the relevant CD-ROMs and hard drives in the computers seized from the Defendant's home -the computers on which pornography was allegedly stored and by which they were allegedly obtained.

6. The expert, in response to a letter from Assistant United States Attorney Thornhill - See Exhibits "A" and "B" attached, made clear that a mirror image bit by bit copy of each hard drive to be reviewed is required for the forensic analysis, and the government is willing to provide that.

7. However, the expert requires that the copies be made from the relevant hard drives in situ to permit the checking of the Real Time Clock that stamps the files with dates and times, and not from the copies made by law enforcement, because the dates and times stamped on the files are important for issues of access and alibi, and the government is not willing to provide that.

8. In addition, the expert has requested that he be permitted to make the copies himself, so that he can know at the end of his analysis what he has, because he knows what he obtained at the beginning of the analysis, and the government is not willing to permit that.

9. However, the expert is willing to be present when the copies are made, by the government, either in Atlanta or Cedar Rapids, provided that he can detail the manner in which the copies are made, and the government is not willing to permit that.

10. While this method of making the copies was discussed with Assistant United States Attorney Thornhill, and seemed acceptable at one point, the government is now not willing to follow such a protocol -See Exhibit "C" attached.

11. The expert also requires that he be permitted to do the forensic analysis in his offices in Indianapolis in order that he have access to his equipment, software, etc, and the government is willing to permit that.

12. However, the government insists that the hard drives remain in the custody of the Postal Inspection Service, which means that law enforcement must be allowed to remain in the same room at all times and secure them when not in use

13. The presence of law enforcement during the forensic examination of the hard drives would compromise the defense strategy by permitting the government access to work product.

14. In addition, the government securing the drives whenever the expert stops working or law enforcement must attend to other business on a regular or emergency basis would in all likelihood hamper the process of examination, because the expert's hours and law enforcement's hours are not likely to mesh.

15. The expert often works twelve hour days, and at odd hours to efficiently fit in the work.

16. The expert has a secure location for the hard drives, viz. A safe bolted to the concrete floor and a safe within that, and would be willing to place them in a lock box provided by the government, within the second safe.

17. The defendant is willing to comply with any reasonable protections this court deems appropriate, which would not undermine his right to a fair trial.

18. ISA Forensics is currently operating under a protective order issued by the District of Nebraska -See Exhibit "D" attached.

19. The undersigned has spoken with the Assistant United States Attorney, Ian Thornhill, on this case, and he objects both to the making of mirror images as detailed above and to the expert doing his review and analysis as detailed above.

THEREFORE, the Defendant requests this Court grant this Motion to Compel Discovery.

DATED this 26th day of August, 2004, at Cedar Rapids, Iowa.

NADLER & WESTON

C

BY:

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ATTORNEY FOR DEFENDANT

Copies to:

Ian Thornhill, Ass't U.S. Attorney
Stephen A. Swift

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon an attorney of record for each party to the above-entitled cause at their respective address as disclosed by the pleadings on **August 26, 2004**.

By U.S. Mail Fax
 Hand Delivered Overnight Courier
 Federal Express Other
 Electronic Noticing (CM-ECF)

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,	)	NO. CR 04-12
)	
vs.)	
	)	BRIEF IN SUPPORT OF
BRION DODD JOHNSON,	)	MOTION TO COMPEL DISCOVERY
)	
Defendant.)	

Defendant Brion Dodd Johnson, by and through his attorney, Charles H. Nadler, submits his Brief in Support of his Motion to Compel Discovery for good cause shown, pursuant to Fed. R. Crim. P. 12(b)(3)(E), 16(a)(1)(E) and 16(d)(2), and the Fifth and Sixth Amendments to the United States Constitution, as follows:

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ISSUE:

The Defendant is requesting that the Court issue an order compelling the government to do two things, viz. (i) permit ISA Forensics, the Defendant’s expert, to make bit by bit mirror image copies of the relevant hard drives in situ, and relevant CD-ROMs, or to be present when and detail how the government’s expert does so, to provide the forensically relevant and accurate copies to be analyzed by the Defendant’s expert; and (ii) permit ISA Forensics to take custody of

the hard drives and CD-ROMs so produced for forensic analysis at its offices without the presence of law enforcement.

STATEMENT OF FACTS:

The Defendant is charged in a two-count indictment with possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2), and receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and (b)(1).

The government seized computers, hard drives (20 or more), CD-ROMs(3 or more), disks and other computer related items, and other items, from Defendant's home, pursuant to a search warrant on June 23, 2003. The charges were brought, in part, based on the items seized, and some of the items seized are alleged to contain the child pornography, and to have facilitated the receipt of the child pornography, which are the subject matter of those charges.

The search warrant was obtained, in part, on the basis of allegations made by a woman with knowledge of computers and access to Defendant's computers, a woman who had been in a relationship with the Defendant, a relationship which had gone sour. It was also based in part upon three CD-ROMs shown to law enforcement by this same person. They contained child pornography.

Some of the computers seized were connected to a network. The network connected some of the computers to one or more computers in another apartment in the same building. The network was connected to the internet. Allegations have been made that the Defendant kept software on his computers to enable him to wipe his hard drives clean if law enforcement were to attempt to recover data from the hard drives. Suggestions have been made that the child pornography was downloaded onto the hard drives using a file sharing software program called

Kazaa or Kazaa Lite. In fact, a directory in the items seized was labeled the Kazaa directory.

The government made copies of the hard drives using EnCase forensic software.

The government has permitted the undersigned to view the child pornography from disks made by the government from the original computer materials using specialized forensic software. The pictures were shown and were only allowed to be shown by the postal inspector to the undersigned at the offices of the United States Attorney. The undersigned felt that any attempt to ask questions or to view certain technical aspects of which the undersigned is aware with his meager knowledge would have tipped the case agent to the undersigned's defense theories, viz. Work product.

ARGUMENT:

Under the Fifth and Sixth Amendments to the U.S. Constitution, the Defendant is entitled to effective assistance of counsel in preparing for his trial.

In according this right to the Defendant this Court and Chief Judge Loken of and for the Eighth have authorized the Defendant to hire a computer forensic expert, because such is necessary in order to effectively prepare a defense for trial, which is currently set for September 7, 2004. The reason the expert is necessary is because there are technical issues of understanding the evidence against the Defendant and of investigation that the undersigned is not qualified for without the assistance of a computer forensic expert. Counsel for the Defendant has hired a computer forensic expert at government expense, viz. ISA Forensics, Inc. (2610 South Lynhurst Drive, Indianapolis, IN 46241; (317) 997-2608; FAX: (866) 379-9575).

The expert will need to make a forensic analysis of at least two of the more than 20 hard drives seized, and will need to make a forensic review of at least three or four of the CD-ROMs

seized.

The purpose of the forensic analysis is to determine how the child pornography got on the hard drives and CD-ROMs, when they got there, whether they were viewed, and if so when.

In order to achieve these goals the expert will need constant and continual access to the exact computer information, data files, and bytes contained on each of the relevant CD-ROMs and hard drives in the computers seized from the Defendant's home -the computers on which pornography was allegedly stored and by which they were allegedly obtained.

In discussions with the Assistant U.S. Attorney on this case, Ian K. Thornhill, he requested the undersigned to inform him of the format the information from the hard drives should be put in on the three hard drives supplied to the government for that purpose by the prior attorney. The undersigned explained that he did not have the expertise, nor at the time did he have an expert to tell him.

The government in Exhibit "A" indicates that it has already made mirror image copies and will allow their analysis only under their supervision. Further, it will allow the examination of the original computer in the presence of the postal forensic examiner in Cedar Rapids.

The Defendant's expert, in response in Exhibit "B", made clear that a mirror image bit by bit copy of each hard drive to be reviewed is required for the forensic analysis. The government appears to be willing to provide that.

However, the Defendant's expert requires that the copies be made from the relevant hard drives in situ to permit the checking of the Real Time Clock that stamps the files with dates and times, and not from the copies made by law enforcement, because the dates and times stamped on the files are important for issues of access and alibi.

In addition, the expert has requested that he be permitted to make the copies himself, so that he can know at the end of his analysis what he has, because he knows what he obtained at the beginning of the analysis. In the alternative, the Defendant's expert is willing to be present when the copies are made, by the government, either in Atlanta or Cedar Rapids, provided that he can detail the manner in which the copies are made. While this method of making the copies was discussed with Assistant United States Attorney Thornhill, and seemed acceptable at one point, the government is now not willing to follow such a protocol. Exhibit "C".

While the Real Time Clock can be read independently from the hard drives, how the date and time from the clock is stamped on each file is highly significant for this case. This is because the files at issue have dates and times. The persons in the case did or did not do things at various dates and times. The Defendant has been accused of receiving and possessing child pornography at various dates and times. If the manner in which the clock stamps the files is working properly that says one thing, and if not that says another. They can be set wrong. They can be read wrong. They can be written wrong.

The government's concern with permitting the Defendant to make copies of the items at issue seems to be that the items are evidence and might be compromised.

The Defendant's expert is willing to follow any reasonable safeguards this court sets in order to avoid compromising the evidence. These might be best worked out between the experts, who know the dangers better than we do.

Fed. R. Crim. P. 16(a)(1)(E), clearly gives the Defendant the right "to copy...data", which is what bits are on a hard drive or CD-ROM. The data is going to be used by the government in its case-in-chief. The items were seized from the Defendant.

Therefore, the government should be compelled to permit non-destructive copying to facilitate forensic analysis.

The Defendant's expert also requires that he be permitted to do the forensic analysis in his offices in Indianapolis in order that he have access to his equipment, software, etc.

In Exhibit "A" the government indicates that the hard drives would remain in the custody of the postal inspector and would the forensic analysis would be done under the supervision of the postal inspector. The government suggests that this can be done without interfering with the forensic examination by the Defendant's expert. But the government securing the drives whenever the expert stops working or law enforcement must attend to other business on a regular or emergency basis would in all likelihood hamper the process of examination, because the expert's hours and law enforcement's hours are not likely to mesh. The expert often works twelve hour days, and at odd hours to efficiently fit in the work.

In Exhibit "C", the government explains that this means that law enforcement must be present during the examination, in the same room, and must be permitted to secure the items when not being examined. The government states this does not mean that the law enforcement would have to view the analysis or be privy to the work product, but this is clearly unavoidable, because the agent would be in the room and must look if the point is to make sure the items are not taken out of the room, etc. Thus, presence of law enforcement during the forensic examination of the hard drives would compromise the defense strategy by permitting the government access to work product.

The government notes the paucity of case law on the subject. It relies on three cases. The Eighth Circuit, has said with respect to video tapes, that copies need not be provided where the

expert could view them at the U.S. Attorney's offices. United States v. Horn, 187 F.3d 781 (8th Cir. 1999). Horn is a very different sort of case, because computer hard drives and CD-ROMs contain information not found on video tapes that is forensically significant, e.g. file sizes, dates, times, the type of file, whether the files were or were not viewed, computer programs for creating, receiving, opening, viewing files of various types, etc. In addition, Horn doesn't say what kind of expert would view the tapes for what purpose. Such a vague request for copies is not the case here. The Fifth Circuit case is not binding on this Court. United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1993). In that case, it is unclear what kind of expert was involved, and what the purpose of the requested copying was. In that case the government was apparently going to provide the original items to the expert. The only reason given by the defense appears to be the voluminous nature of the materials. Here it is otherwise, viz. The need to perform a proper forensic analysis on a proper copy of the original, without destroying the original or tipping one's hand, is the reason for copying. The Eastern District of Virginia case is also not binding. United States v. Husband, 246 F.Supp. 2d 467 (E.D. Va. 2003). In that case, as in Horn, the items at issue are video tapes. In that case, the court relies upon Horn and Kimbrough, and does not give new reasons for denying copying. In that case, the Defendant wanted a copy to show an expert to determine the ages of the persons on the tape to determine whether they were children. The government was willing to permit viewing for that purpose. This is again a very different sort of case, because computer hard drives and CD-ROMs contain information not found on video tapes that is forensically significant, e.g. file sizes, dates, times, the type of file, whether the files were or were not viewed, computer programs for creating, receiving, opening, viewing files of various types, etc.

Finally, all three cases seem to take the claim seriously that the video tapes and the pornography are contraband, and so no copies should be made, but there is no legal basis provided that states that an expert of the proper kind in a criminal case under proper strictures cannot be provided contraband for analysis to satisfy the Constitutional requirement for a fair trial. In drug cases, drugs are delivered to laboratories for analysis. Drugs are surely contraband.

In the instant case, the expert has a secure location for the hard drives, viz. A safe bolted to the concrete floor and a safe within that, and would be willing to place them in a lock box provided by the government, within the second safe. Exhibit "B".

The defendant is willing to comply with any reasonable protections this court deems appropriate, which would not undermine his right to a fair trial.

Finally, ISA Forensics is currently operating under a protective order issued by the District of Nebraska. Exhibit "D". While the District of Nebraska Memorandum and Order are not binding, they are within the confines of our Circuit, and the Memorandum thoughtfully explores the issues. United States v. Carrfrey, No. 4:03 CR 3110 (D. Neb. June 14, 2004). The conditions outlined are the conditions ISA Forensics is willing to work under.

CONCLUSION:

THEREFORE, the Defendant requests this Court grant this Motion to Compel Discovery.

DATED this 26th day of August, 2004, at Cedar Rapids, Iowa.

NADLER & WESTON

C

BY:

CHARLES H. NADLER LI0008355
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ATTORNEY FOR DEFENDANT

Copies to:

Ian Thornhill, Ass't U.S. Attorney
Stephen A. Swift

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon an attorney of record for each party to the above-entitled cause at their respective address as disclosed by the pleadings on **August 26, 2004**.

By U.S. Mail Fax
 Hand Delivered Overnight Courier
 Federal Express Other
 Electronic Noticing (CM-ECF)

Signature C

informed defense counsel that it will not seek to determine the nature, scope and results of defense counsel's examination of the copied hard drives. See Exhibits 2 & 3. It is also undisputed that the United States has offered to provide the defense's expert with access to the original computer equipment for purposes of determining the accuracy of the internal clock. See Exhibits 2 & 3. Nevertheless, citing only a perceived inability of the United States to make create accurate mirror image copies of defendant's hard drives, defendant has rejected the United States' offer of access to mirror image copies and has filed a motion seeking an order from this Court requiring the United States to provide access to the original¹ contraband-laden hard drives, and to provide copies of these same hard drives to the defense. See Exhibit 4. As shown below, defendant's motion is not supported by the facts or the law and should be denied.

A. THE FACTS

The United States believes that evidence at trial will show that, in late 2002 to early 2003, defendant knowingly received and attempted to receive child pornography on his IBM PC Server 3518, Model 001 computer with the serial number 23A2026. The United States also believes that evidence at trial will show that, in June 2003, defendant possessed and attempted to possess child pornography on this same computer.

¹ Shortly before the August 23, 2004, status conference in this case, the United States was provided with a letter from defendant's computer expert (Exhibit 4). This was the first time the United States learned that defendant was rejecting the mirror image copies of the computer hard drives he originally requested, seeking instead to have his expert make copies from the original seized computer equipment.

Defendant's conduct was discovered when an informant, with access to defendant's Marion, Iowa, residence, provided Marion Police Department detectives with three compact disks containing child pornography the witness indicated belonged to defendant. Thereafter, local law enforcement officers executed a search warrant at defendant's residence and seized a number of items, including the IBM computer referenced above. A federal search warrant for this seized computer equipment, and the subsequent search thereof, uncovered stored images of child pornography. These stored images were contained in password protected "zip" files.

B. Procedural History

On February 5, 2004, defendant, was indicted on one count of possession of child pornography and one count of receipt of child pornography. The defendant was detained pending trial by Chief Magistrate Judge John A. Jarvey on February 23, 2004. On March 2, 2004, defendant filed a motion to suppress the computer evidence. On March 16, 2004, Magistrate Judge Paul A. Zoss recommended defendant's motion to suppress be denied. On March 23, 2004, Judge Linda R. Reade adopted Magistrate Judge Zoss' Report and Recommendation and denied defendant's motion to suppress.

On April 2, 2004, the Court granted defendant's motion to continue the trial date. At an April 7, 2004, hearing, defendant's original counsel was released because of an apparent conflict of interest and current counsel was appointed at the request of defendant. On April 26, 2004, the grand jury returned a superseding indictment which merely changed the alleged time frame of the criminal conduct in Count 2. On May 3 &

10, 2004, defense counsel filed status reports detailing issues with respect to obtaining a defense computer expert. Citing these same issues, defendant requested, and then received a second continuance of the trial date on May 13, 2004. On June 3, 2004, defense counsel filed a third status report, again addressing issues with respect to securing a defense computer expert. On June 8, 2004, defendant filed a third motion to continue. This motion was granted, continuing the trial from July 6, 2004, to September 7, 2004. On July 15, 2004, in the wake of Blakely v. Washington, 124 S.Ct. 2531 (2004), the grand jury returned a second superseding indictment, adding sentencing notices to each of the two pending counts.

II. ARGUMENT

DEFENDANT'S REQUEST FOR POSSESSION OF THE CONTRABAND-LADEN HARD DRIVES SHOULD BE DENIED

Defendant contends that he must have access to copies of his hard drives to adequately prepare for trial. In response, the United States has agreed to provide such access by making copies of the hard drives available to the defense for unrestricted examination at a location convenient for their retained expert, provided the mirror image copies remain in the custody of law enforcement. The United States has also informed defendant that it will not attempt to learn what analysis defendant is performing on the hard drive copies. Defendant has rejected the United States' offer and has moved this Court for an order requiring the United States to allow the defense expert to make his own mirror image of the original seized computer hard drives and also to allow the defense to retain copies of the hard drives containing large amounts of contraband

without law enforcement supervision. Defendant's request is unsupported by the case law and should be denied.

Indeed, defendant cites no cases in support of his motion because there appear to be none. In every case that the United States has found in which a court has considered whether copies of child pornography must be provided to the defense, the court ruled that such copies need not be provided where, as here, the United States has agreed to provide access to the requested materials.

For example, in *United States v. Horn*, 187 F.3d 781, 792 (8th Cir. 1999), the defendant challenged the district court's denial of his motion, under Rule 16(a)(1)(C), to "have copies of the video tapes [containing child pornography] that were going to be used against him at trial so that any expert witness that he might procure could see and evaluate them." The Eighth Circuit Court upheld the district court's refusal to order such copies be provided, explaining:

The trial court denied the motion, holding, *inter alia*, that the government's offer to allow Mr. Horn's expert to view the tapes would accomplish the same object that Mr. Horn sought; and, indeed, Mr. Horn does not show how he was prejudiced by the trial court's ruling. We note, too, that Fed.R.Crim.P. 16(d)(1) provides that '[u]pon a sufficient showing the court may at any time order that the discovery of inspection be denied, restricted, or deferred.' We think that the restriction that the trial court impose here, given the fact that the tapes were *prima facie* contraband, was authorized by the relevant rule.

Id.

Similarly, in *United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995), the Fifth Circuit ruled that "[c]hild pornography is illegal contraband" and declined "to find that Rule 16 provides such contraband can be distributed to, or copied by, the defense."

Id. The Fifth Circuit concluded that the United States' "offer to make the materials available for inspection but not to allow them to be copied was reasonable." Id.

Finally, in *United States v. Husband*, 246 F.Supp. 2d 467 (E.D. Va. 2003), the district court found that the United States' offer to make video of child pornography available for inspection, but not for copying, did not violate due process rights of defendant charged with possession and transportation of child pornography, since the videotape at issue constituted contraband.

Here, as in each of the above cases, the United States has offered access to the requested materials. Defendant, however, has declined the offered access without even attempting to conduct the examination defendant professes to seek. Instead, defendant speculates that the United States is incapable of making an accurate mirror image of the seized hard drives and states no reason why completing the desired analysis with a law enforcement officer in the room will jeopardize their work. Defendant's refusal to even try to conduct the examination under these conditions lessens any import of defendant's claim that the United States' proposed access is unworkable.

In sum, the case law supports the United States' position with respect to access to, versus possession of, material containing child pornography. Defendant's unsupported and speculative claims regarding inconvenience and resulting prejudice do not compel a different result. Each of the victims depicted in the child pornography at issue has suffered sexual exploitation, abuse, assault, humiliation, and degradation.

Additional copying and distribution of the child pornography further victimizes each of these children. See *New York v. Ferber*, 458 U.S. 747, 759 (1982) (“[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.”). The defense expert's speculation that the reasonable concessions offered by the government would somehow prohibit them from conducting a fair and adequate examination of the evidence in this case cannot be found to outweigh the protection of such victims.

III. CONCLUSION

For the reasons set forth above, the Court should deny defendant's Motion to Compel Discovery.

Respectfully submitted,

CHARLES W. LARSON, SR.
United States Attorney

By: /s/ Ian K. Thornhill

IAN K. THORNHILL
Assistant United States Attorney
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Ian.Thornhill@usdoj.gov
(319) 363-6333
(319) 363-1990 - fax

CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on August 27, 2004.

UNITED STATES ATTORNEY

BY: /s/ C. White _____

COPIES TO:

Charles Nadler, Esq.



U. S. Department of Justice

United States Attorney
Northern District of Iowa

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April 1, 2004

Via Fax and Mail

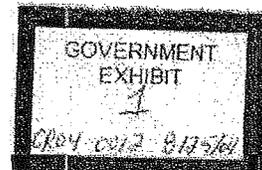
Mr. Wallace L. Taylor, Esq.
118 3rd Ave. SE
Suite 326
Cedar Rapids, Iowa 52401-1408

Re: *United States v. Brion Dodd Johnson*, CR 04-012-LRR
Second Draft of Witness & Exhibit Lists

Dear Mr. Taylor:

Enclosed please find an updated copy of my witness and exhibit lists. Please discard the earlier versions I provided you in person this morning. As we discussed, we will need to meet prior to our hearing tomorrow in order to determine whether you object to any of these exhibits on the grounds that they do not depict sexually explicit conduct or that you feel they are otherwise not relevant. I reserve the right to amend these lists in the future, especially if your continuance motion is granted.

Additionally, as you recall, on March 23, 2004, I facilitated a conference call between you, your assistant (your wife, I believe), Inspector Raper, and Pete Gonzalez, the United States Postal Inspection Service computer forensic examiner. During that call, we discussed exactly what "type" of mirror image you desired. Mr. Gonzalez explained that we could either give you the mirror image as produced by the EnCase program or we could simply provide a mirror image of the hard drives as they appeared the day they were seized from your client (hereafter "simple mirror image"). Mr. Gonzalez explained that either version was possible but that the EnCase version would be somewhat easier to use. He also explained that you would need EnCase to view it. I also explained that your expert would have to provide the necessary computer equipment and programs to complete his analysis. Based upon this conversation, you requested an EnCase version of the mirror image.



When your expert, Mr. Wilson, arrived this morning, it was apparent that he did not have the tools with him necessary to examine the hard drives. It was also determined that Mr. Wilson does not currently possess a copy of the EnCase program. In addition, you mentioned that obtaining EnCase would be expensive as the program costs \$2,500. At this point in the meeting I facilitated a conference call between you, Mr. Wilson, Mr. Gonzalez, and Inspector Raper so that Mr. Wilson could get some background and process information from Mr. Gonzalez.

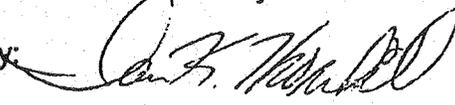
Now that you have had the opportunity to discuss this matter with your expert and he has had the opportunity to obtain some information from Mr. Gonzalez, if you have changed your mind and would now prefer a "simple" mirror image version of defendant's hard drives, as was previously offered, please let me know so that this can be arranged. As with the EnCase version mirror image already provided, you would be required to provide the necessary hardware (hard drives) upon which to place the "simple" mirror image. Also, as with the EnCase version, Inspector Raper, or another law enforcement officer, would need to be present as this mirror image will contain contraband in the form of child pornography. Moreover, as I indicated in our meeting this morning, I would be willing to allow Inspector Raper to bring the mirror image hard drives (whichever version you ultimately choose to use) to a location more convenient for Mr. Wilson.

I realize that your decision on how to proceed in this matter depends greatly on the outcome of your pending continuance motion. Therefore, I would be happy to discuss this with you after our 12:00 p.m. hearing tomorrow (April 2nd).

If you have any questions, please let me know.

Sincerely,

CHARLES W. LARSON, SR.
United States Attorney

By: 

IAN K. THORNHILL
Assistant United States Attorney

Enclosures



U. S. Department of Justice

United States Attorney
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July 26, 2004

Via Facsimile and Mail

Mr. Charles H. Nadler, Esq.
Nadler & Weston
305 2nd Street S.E.; Suite 420
Cedar Rapids, Iowa 52401

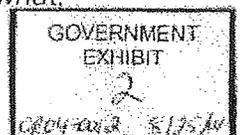
Re: *United States v. Brion Dodd Johnson*, CR 04-012-LRR

Dear Mr. Nadler:

I am writing to inquire as to the status of your consultations with a computer expert in the above referenced case. Earlier this month you informed me that funding for an expert had been approved and that you had identified an expert from Indiana. During that discussion, you expressed your desire to allow your expert "unsupervised" use of the mirror imaged hard drives I have made available to you. You also indicated that your expert would need to view the original computer equipment in this case in order to perform a complete evaluation.

In response to these requests I informed you, first, that I would arrange for a postal inspector in Indiana to take custody of the mirror imaged hard drives and facilitate the examination of them by your expert. I am confident that these mirror imaged hard drives, and the contraband contained thereon, can remain under the supervision of the postal inspector without interfering with your expert's examination or breaching the confidentiality of the work your expert will be performing. Because these hard drives contain contraband, they must remain under the supervision of law enforcement.

Second, I indicated that I would make arrangements for your expert to view the original computer evidence in this case as long as the forensic examiner from the Postal Inspection Service was also present. I propose doing that here in Cedar Rapids at the Postal Inspector's office. Before I make these arrangements, I need know exactly what



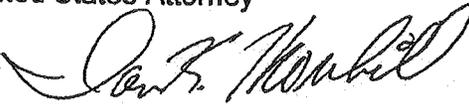
if any, procedures your expert intends to perform on this equipment so that I can advise our forensic examiner in an effort to ensure the integrity of the original evidence.

It is my understanding from prior conversations that you will be out of town approximately the first two weeks of August. Please contact me by July 30, 2004 so that we may discuss this matter. The September 7, 2004 trial date and other important deadlines are fast approaching. We need as much time as possible to coordinate the logistics in this case and work out any issues that you may have with my proposals.

If you have any questions, please do not hesitate to contact me.

Sincerely,

CHARLES W. LARSON, SR.
United States Attorney

By: 

IAN K. THORNHILL
Assistant United States Attorney



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August 23, 2004

Via E-Mail and Facsimile

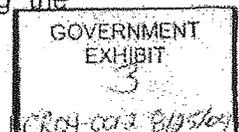
Mr. Charles H. Nadler, Esq.
Nadler & Weston
305 2nd Street S.E.; Suite 420
Cedar Rapids, Iowa 52401

Re: *United States v. Brion Dodd Johnson*, CR 04-012-LRR

Dear Mr. Nadler:

Prior to the 12:30 p.m. status conference today in the above referenced case you provided me with a copy of a letter to you (dated August 22, 2004, but apparently faxed on August 23, 2004) from Darren R. Sebring, of ISA Forensics. This letter was a response to my July 26, 2004, letter to you in which I offered to accommodate the examination of the mirror imaged hard drives in this case by your experts. In his letter, Mr. Sebring indicates not only that having access to these mirror images under the custody of the Postal Inspection Service is unacceptable, but he also demands full access to the original computer equipment for the purposes of making his own mirror image copy. This is the first I have heard about the desire to create your own mirror images from the original computer evidence.

The United States is unwilling to make the original computer evidence available to your expert for the purposes of re-imaging the hard drives. Rather, as I originally told Wallace Taylor in a letter dated April 1, 2004, when these mirror image hard drives were first made available to the defense, the United States is willing to accommodate the examination of these mirror images by a defense expert. Specifically, the United States is willing to deliver the mirror images to a location more convenient to your expert, including the expert's own facilities. However, it is required that these mirror images remain in the custody of the Postal Inspection Service as they contain contraband (i.e. child pornography). By this I mean that the case agent or some other law enforcement officer must be allowed to remain in the same room with these mirror images during the



examination and must be allowed to secure them when not in use. The designated law enforcement officer would not need to view the actual analysis your expert would be performing on the mirror images nor be privy to any work product generated by the expert. The designated law enforcement officer would have to confirm that the equipment being used to complete the examination was not hooked to any type of network, the internet, or other potential means of reproduction or dissemination of the contraband.

There is very little case law that addresses this particular situation. I direct you to the following cases that support the conditions the United States has placed on your access to the mirror imaged hard drives in this case:

In *United States v. Horn*, 187 F.3d 781, 792 (8th Cir. 1999), the defendant challenged the district court's denial of his motion, under Rule 16(a)(1)(C), to "have copies of the video tapes [containing child pornography] that were going to be used against him at trial so that any expert witness that he might procure could see and evaluate them." The Eighth Circuit Court upheld the district court's refusal to order such copies be provided, explaining:

The trial court denied the motion, holding, *inter alia*, that the government's offer to allow Mr. Horn's expert to view the tapes would accomplish the same object that Mr. Horn sought; and, indeed, Mr. Horn does not show how he was prejudiced by the trial court's ruling. We note, too, that Fed.R.Crim.P. 16(d)(1) provides that '[u]pon a sufficient showing the court may at any time order that the discovery of inspection be denied, restricted, or deferred.' We think that the restriction that the trial court impose here, given the fact that the tapes were *prima facie* contraband, was authorized by the relevant rule.

In *United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995), the Fifth Circuit ruled that "[c]hild pornography is illegal contraband" and declined "to find that Rule 16 provides such contraband can be distributed to, or copied by, the defense." The Fifth Circuit concluded that the United States' "offer to make the materials available for inspection but not to allow them to be copied was reasonable."

In *United States v. Husband*, 246 F.Supp. 2d 467 (E.D. Va. 2003), the district court found that the United States' offer to make video of child pornography available for inspection, but not for copying, did not violate due process rights of defendant charged with possession and transportation of child pornography, since the videotape at issue constituted contraband.

Finally, in talking to the United States' computer expert, it is my understanding that the date and time "clock" internal to the computer can be accessed independent of the hard drives. As I stated in my July 26, 2004, letter, the United States is willing to allow your expert to confirm the reading of this "clock" on the original computer as long as our expert is also present and can observe that procedure. This would seem to address the date and time issue raised by your expert in his letter. The only other reason given for the need to make your own mirror image copy of the hard drives is an apparent distrust in the United

States' ability to make an accurate copy on its own. This speculative reasoning does not provide a basis for giving your experts unrestricted possession and access to the original evidence in this case, including the contraband contained therein.

If these arrangements are not acceptable, you will need to get the court involved as quickly as possible. If you have any additional questions, please let me know.

Sincerely,

CHARLES W. LARSON, SR.
United States Attorney

By:


IAN K. THORNHILL
Assistant United States Attorney

email to Fax Message Delivery



TM

<http://www.maximail.com>

To : Charles Nadler
Fax # : 1-319-366-6176
Sender : Joseph Cheser
Date : 08/23/2004
Re : Brion

Number of pages (Including cover sheet): 3

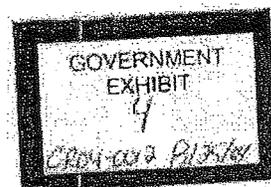
Good Morning,

Attached is our response to AUSA Thornhill's letter. If I can be of any further help please feel free to call me 317-997-2608 and I will be happy to discuss anything that you may need.

Best wishes,

Darren R. Sebring

COPY



ISA Forensics

Offices in Hamilton and Morgan Counties



Darren R. Sebring,
Forensic Examiner
Fishers, IN

Joseph I. Cheser III
Forensic Examiner
Marionville, IN

August 22, 2006

Mr. Nadler:

Thank you for giving us the opportunity to work with you on U.S.A v. Brian Dodd Johnson, CR 04-12-LRR

After speaking with you about this case, we feel it would be unfair to Mr. Johnson to accept the terms offered by AUSA Thornhill. In addition, we would object to the requirement to view the hard drives in the office of the US Postal Inspector in Indiana. In order for ISA Forensics, Inc. to provide a fair and adequate examination, we would require full access to the seized computers to verify the RTC (real time clock), and would strongly prefer to be allowed to produce our own mirrored images, and return with those images to our office where we could examine them ourselves without compromising our strategy or our case. Providing us with just a mirror copy of the hard drives in question would not afford us the ability to be accurate in our reporting as we would be unable to determine the discrepancy between the file date and times on the computer and the actual real time. Furthermore, we would be forced to rely on information provided from the people who seized the computers and trust they would provide us with accurate information and in a timely manner. In AUSA Thornhill's letter to you he states, "because these hard drives contain contraband, they must remain under the supervision of law enforcement" I am unaware of any statute which states this requirement. If AUSA Thornhill was referring to 18 U.S.C. § 2252 A, there is no distinction made between the FBI US Postal Inspectors, or ISA Forensics, Inc. as civilian forensic examiners concerning possession of the contraband in question.

A second request made by AUSA Thornhill would arrange for us to view the original computer evidence in the case as long as the forensic examiner from the Postal Inspection Service was also present. We have no problem with this as long as AUSA Thornhill is referring to us verifying the RTC and is not in any way having us agree to a forensic examiner being present during our actual examination of the drives.

If the Court so ordered, we have the ability to bring the images back to our Indianapolis office where we can view the images on a computer which is not network connected or connected to the Internet. We will affirm that the hard drive images would be highly encrypted which would guarantee that they could not be viewed or copied, even if stolen. The images would only be

ISA Forensics, Inc

(317) 244-5690

www.ISAForensics.com

viewed at our office and even then only by forensic examiners Joseph L. Cheser III and/or Darren R. Sebring. When not being viewed, the images would be locked in our safe (which is a safe within a safe, and bolted to the concrete floor), still encrypted. After the case is disposed of, the hard drives will be wiped according to DCD standards.

We will be available to start on these drives as early as August 26th up until September 7th. However, we will be out of the country from September 7th until September 19th and would be able to resume any investigation upon our return on September 20th.

Sincerely,

Darren R. Sebring
Forensic Examiner

ISA Forensics, Inc

(317) 244-9690

www.ISAForensics.com

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BRION DODD JOHNSON,

Defendant.

No. CR04-0012

ORDER

This matter comes before the court pursuant to the defendant's August 26, 2004, motion to compel discovery. The government resisted the motion on August 27, 2004. The motion is granted in part and denied in part.

This case arises out of the seizure of a very large amount of child pornography from hard drives and CD-ROM disks located at the defendant's residence. He was detained by the court. The government's resistance accurately reflects the status of this case. Two problems have caused significant delays. First, the defendant's first attorney learned of a potential for conflict of interest some time after he had commenced work for the defendant. Substitute counsel had to be appointed and the transition is responsible for some delay. Second, when funds were sought by the defendant for a computer expert, the request was initially denied by the Eighth Circuit Court of Appeals. It was then granted after the court made a second request for these funds. An expert was requested to analyze the dates and times of the downloading of files containing child pornography. The parties now have a dispute over the manner in which the defense expert can copy and examine files on the hard drives that were seized from the defendant.

It is important to note at the outset what is and is not at issue in this motion. It is also important to note what is and is not important to review as a part of the expert analysis at issue in this case. The expert in this case wants to analyze the dates, times, and circumstances surrounding the creation of patently offensive files. The expert wants to examine evidence of how and when it was made, not the images themselves. No good person wants to look at this stuff. Unfortunately, when you are involved in the criminal justice system, sometimes you have to. Just as no good people want to look at this material, no good people want to disseminate it either. Good people, whether working for the prosecution or the defense, all share the same disdain of this material and all share the same disdain for its dissemination.

The government cites cases in its resistance that state the obvious. Videotapes of child pornography do not have to be copied in order for defense counsel to determine that they are illegal. If there is a question about the age of the participants, that issue can be resolved without making copies of pornographic videotapes. This is just as obvious as the fact that we do not return firearms to felons or drugs to abusers. However, the issue in this case concerns the creation of computer files and does not involve issues as to whether the material constitutes child pornography.

In its brief the government states:

Additional copying and distribution of the child pornography further victimizes each of these children.

(Brief at 7). However, nobody has expressed any interest in any additional copying other than that which the government has already indicated a willingness to do. The defense expert simply wants that level of access to the files that the government is willing to copy which would reflect the dates and times of the creation of files as reported by the real time clock. Thus, the only thing the defense wants beyond that which the government is willing to provide is computer file creation information, not child pornography.

The government also demands that the defense expert be supervised by the government whenever examining the hard drives at issue. Apparently, the government does not want to watch the expert do his work but simply be present on the premises when it is done. The court does not know what this accomplishes other than securing the physical objects at issue. The expert has a secure location for these hard drives consisting of a safe bolted to the concrete floor with a safe within that safe. The expert is further willing to place the hard drives in a locked box provided by the government, within the second safe. The District of Nebraska has crafted an appropriate protective order for these situations that the expert is currently operating under in an unrelated case.

If all of the images on these hard drives constitute child pornography and if there were a way to copy the drives that deleted the images or replaced them with non-pornographic images, the court would consider that to be an acceptable solution to the problem. No one has suggested it.

There are several competing interests here. First, the defendant is entitled to determine when and how the files on the computer were created to the extent that this information is available. Second, the defense has been given a very finite and limited budget for experts that is being wasted to some extent by this dispute. Third, appropriate protections need to be put into place in order to prevent further dissemination of the materials at issue in this case. The court's limited expertise with sophisticated computer issues prevents it from proposing solutions other than those offered by the parties.

The defendant is entitled to make an examination of the hard drives in question that permits the checking of the real time clock. If this can only be done by having the defense expert operate the original computer, then the expert can do this by examining the computer at a law enforcement facility with the direct supervision of a law enforcement officer. If it is a matter of making a different copy of the hard drive than that already provided, that copy can be made by law enforcement officials. Of course, in no event

shall either party perform any destructive testing of the original computer without notice to their opponent and permission of the court.

Once copies are made they shall be delivered to the defense expert who will store them within the double safe identified in the defendant's motion. The materials shall remain in the safe at all times other than when the expert is present and examining those materials. No copying whatsoever of any files shall be done without prior approval of the court. At the time judgment is entered in this matter, all materials provided to the expert shall be returned to the law enforcement agency from which it was received.

The defendant is entitled to the information identified in paragraph 7 of his motion to compel discovery. Assuming that this information can be provided by way of a copy, the government can make that copy. Accordingly, the relief requested in paragraphs 8 and 9 is denied. The expert may conduct his forensic analysis in his office unsupervised by law enforcement.

Upon the foregoing,

IT IS ORDERED

1. That the defendant's motion to compel discovery is granted and denied as set forth in the text above.

2. The government shall release the materials to defendant's expert witness's laboratory ensuring an appropriate chain-of-custody record is made throughout the testing process. To the extent possible, all such items shall be conspicuously marked to identify them with this case, and defendant's counsel and defendant's expert witness shall give a receipt therefor.

3. All such items shall be kept by defendant's expert witness at all times in a locked, secured place, accessible only to defendant's expert witness. Any computer used to access any hard drives must not be connected to the Internet or any other local area

network. None of the items nor the material shall be altered in any way without prior order of the court.

4. No person other than the expert may examine or have access to this material without further order of the court.

5. No other copies of any of this material shall be made.

6. At the conclusion of this case, that is, when the judgment has become final, all of the material subject to this order shall be returned to counsel for the government, who shall return it to the investigating agency for destruction in accordance with its policies according to law.

August 30, 2004.



JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

FILE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED

NORTHERN DISTRICT OF IOWA

SEAR RAPIDS HOURS. OFFICE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 Defendant.)

BY _____

MOTION IN LIMINE
(EVIDENCE)

through counsel, respectfully moves in limine to exclude the following evidence:

1. Evidence of the Defendant's prior convictions for criminal sexual conduct, 4th degree and criminal sexual conduct, 3rd degree. *SUSTAIN / SUBJECT TO REVISION*
2. Evidence of the images of alleged child pornography seized from the computer in Minnesota. *SUSTAIN / GOVT. TO REVISION*
3. Evidence of the photographs of alleged child pornography seized from a residence in Minnesota. *OVER RULE*
4. Evidence of images, found on the computer in Iowa, that are not images of child pornography as that term is defined in 18 U.S.C. § 2256.
5. Any testimony concerning the arrest of individuals purportedly involved in the creation of the images identified by 'series' names (e.g. the "Helen" series, the "Sabban" series), or any of the circumstances surrounding the alleged abuse of the persons in the images, as described in the forensics report regarding the images from Minnesota.

6. Evidence of the Defendant's prior conviction for failure to register as a sex/predatory offender.

A brief in support of this motion is also filed this day.

Respectfully submitted,

FEDERAL DEFENDER'S OFFICE
The Armstrong Centre
222 Third Avenue SE, Suite 501
Cedar Rapids, IA 52401-1542
TELEPHONE: (319) 363-9540
TELEFAX: (319) 363-9542

BY _____

ATTORNEY FOR DEFENDANT,

Certificate of Service

I served a copy of this document on the attorneys of record of all parties as follows:

1. Method of service: personal service
 first class mail
 deposited in box at Clerk's Office, U.S. District Court
 certified mail, return receipt
 fax

2. Date served: _____

I declare that the statements above are true to the best of my information, knowledge, and belief.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

CEDAR RAPIDS HOUSTON'S OFFICE

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

Defendant.)

BY _____

BRIEF IN SUPPORT OF MOTION
IN LIMINE (EVIDENCE)

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, through counsel, respectfully submits the following brief in support of his Motion in Limine (Evidence):

I. PRIOR CRIMINAL SEXUAL CONDUCT CONVICTIONS

The Defendant moves in limine to exclude evidence of his prior convictions for 4th and 3rd degree criminal sexual conduct in Minnesota in approximately 1993 and 1995. Evidence of these two prior convictions is not admissible pursuant to Federal Rule of Evidence 414. Federal Rule of Evidence 414 allows admission of evidence of prior "child molestation" under certain circumstances in a child pornography case. For purposes of Rule 414, the definition of a "child" is "a person below the age of fourteen." Both of the Defendant's prior convictions involved the same girl and, as the Defendant understands it, she was not "below the age of fourteen" at the time of the offenses.

Evidence of the Defendant's prior convictions for 4th and 3rd degree criminal sexual conduct is also not admissible under Federal Rule of Evidence 404(b). Whether or not the Defendant has a conviction for this activity is not relevant to any element the government must prove in this case. Even if this court determines these prior convictions are relevant to an element of one or both of the offenses charged in this case, any probative value of such evidence is far outweighed by the danger of unfair prejudice. See Fed.R.Evid. 403. In particular, if the jury learns of the prior convictions, the jurors will likely assume the Defendant is a registered sex offender. The term 'registered sex offender' carries with it substantial negative connotations, including the belief that such individuals are so likely to re-offend that we must notify the public

of the location of their residence and must restrict the areas in the community where they may live. Such beliefs about a category of people (sex offenders) have no place in a criminal trial, where a defendant is entitled to be tried only on the charges currently pending against him. He should not be tried either on his past conduct or on the likelihood he might commit crimes similar to that past conduct at some point in the future. Indeed, Federal Rule of Evidence 404 specifically precludes the admission of evidence "for the purpose of proving action in conformity therewith on a particular occasion." Fed.R.Evid. 404(a). Given the nature of the offenses charged, the jury is likely to be confused and unfairly prejudiced against the Defendant if they learn of his prior convictions, and evidence of these prior convictions should be excluded.

II. MINNESOTA IMAGES

The Defendant moves in limine to exclude any evidence seized from the computer in Minnesota. This evidence includes images that are alleged to be child pornography. As with the prior convictions for criminal sexual conduct, any probative value of the evidence of additional child pornography from Minnesota is substantially outweighed by the danger of unfair prejudice, and introduction of this evidence may lead the jury to use it improperly as 'propensity' evidence. See Fed.R.Evid. 403, 404.

III. MINNESOTA PHOTOGRAPHS

The Defendant moves in limine to exclude any evidence of the photographs seized from the residence in Minnesota. The government intends to offer into evidence several photographs which they allege portray the Defendant engaged in sexual activity with a person under the age of 18 years. As the Defendant further understands it, the government alleges that these photographs depict sexual activity between the Defendant and the person involved in the 1993 and 1995

criminal sexual conduct convictions. *See* paragraph I, *supra*. As such, these photographs are simply pictorial descriptions of the Defendant's prior convictions. For the same reasons the Defendant seeks to exclude evidence of his prior convictions for criminal sexual conduct, the Defendant also seeks to exclude evidence of the photographs seized from the residence in Minnesota. *Id.*

IV. IOWA IMAGES THAT DO NOT QUALIFY AS CHILD PORNOGRAPHY

The Defendant moves in limine to exclude from evidence any images seized in Iowa that do not portray child pornography. The government seized numerous images from a computer seized from . The government alleges the Defendant possessed images of child pornography on computer. The Defendant asserts that many of the images identified by the government and made available to the Defendant for review do not appear to be child pornography. Instead, several of the images contain no "sexually explicit conduct" involving a "minor." Any images that do not fall within the category of "child pornography," as that term is defined in 18 U.S.C. §2256, should not be admitted into evidence. If the jury is presented with images containing nudity that does not qualify as child pornography, they may become confused as to the accurate definition of "child pornography" for purposes of determining whether the government has met its burden of proof in this case. *See Fed.R.Evid.* 403.

V. INFORMATION FROM MINNESOTA FORENSICS REPORT

The Defendant moves in limine to exclude any testimony or evidence concerning the circumstances surrounding the creation of the images allegedly seized from the computer in Minnesota. The forensics report regarding these images describes generally the circumstances

under which the images were created, the names and ages of the individuals in the images, and whether anyone was convicted for producing the images and the sentence that person received as a result. With the exception of the age of the individuals in the images (but without conceding the admissibility of these images), this information is not relevant to whether the Defendant knowingly possessed or received child pornography as charged in this case. *See Fed.R.Evid. 401*. Even if the court finds this information to be relevant (which the Defendant does not concede), any minor probative value is far outweighed by the danger of prejudice. The jury would hear details about the alleged abuse of the individuals in the images, as well as details about another court case in which a defendant was convicted for child pornography-related offenses. Defendant _____ has the right to have his case considered independent of any other child pornography case, and the results of other criminal trials concerning the production of child pornography are not relevant to _____'s guilt or innocence.¹

VI. PRIOR CONVICTION FOR FAILURE TO REGISTER AS SEX OFFENDER

The Defendant moves in limine to exclude evidence of his prior conviction for failure to register as a sex offender. This prior conviction is not admissible under Federal Rule of Evidence 404(b) or any other rule of evidence, and would serve only to prejudice the jury against the Defendant. *See Fed.R.Evid. 403*.

¹The Defendant also asserts that much of this information is likely to be hearsay if presented at _____ trial, and the Defendant would object to its admission on this ground as well.

FEDERAL DEFENDER'S OFFICE
The Armstrong Centre
222 Third Avenue SE, Suite 501
Cedar Rapids, IA 52401-1542
TELEPHONE: (319) 363-9540
TELEFAX: (319) 363-9542

BY: _____

ATTORNEY FOR DEFENDANT,

cc:
Assistant U.S. Attorney
P.O. Box 74950
Cedar Rapids, IA 52407

Certificate of Service

I served a copy of this document on the attorneys of record of all parties as follows:

1. Method of service: () personal service
() first class mail
(X) deposited in box at
Clerk's Office, U.S.
District Court
() certified mail, return
receipt
() fax

2. Date served: _____

I declare that the statements above are true to the best of my information, knowledge, and belief.

AGREEMENT FOR PRETRIAL DIVERSION

INTRODUCTION

It appearing that you have committed an offense against the United States on or about January 16, 2001, in that it appears that you knowingly possessed images of child pornography in violation of Title 18, United States Code, Section 2252A(a)(5)(B);

Upon your accepting responsibility for your conduct and by your signature on this Agreement and on the Statement of Facts attached hereto, it appearing, after an investigation of the offense and your background, that the interest of the United States and your own interest and the interest of justice will be served by the following procedure; therefore:

On the authority of the Attorney General of the United States, by Charles W. Larson, Sr., United States Attorney for the Northern District of Iowa, prosecution in this district for this offense shall be deferred for the period of twelve (12) months from this date, provided you abide by the following conditions and the requirements of the program set out below. Should you violate the conditions of this supervision, the United States Attorney may revoke or modify any conditions of this Pretrial Diversion Program. The United States Attorney may release you from supervision at any time. The United States Attorney may, at any time within the period of your supervision, initiate prosecution for this offense should you violate the conditions of this supervision and will furnish you with notice specifying the conditions of your program which you have violated.

If, upon completion of your period of supervision, a pretrial diversion report is received to the effect that you complied with all the rules, regulations and conditions, and you have pled guilty to sexual exploitation of a minor in violation of Iowa Code Section 728.12(3) in Linn County, Iowa, and you agree not to request, and do not request, a deferred judgment in that matter, the charge and conduct set out in *United States v. _____* No. CR _____ LRR will not be prosecuted.

CONDITIONS OF PRETRIAL DIVERSION

1. You shall not violate any law (federal, state or local). You shall immediately contact your Pretrial Diversion Supervisor if arrested and/or questioned by any law enforcement officer.
2. You shall work regularly at a lawful occupation. You shall notify your Pretrial Diversion Supervisor at once when out of work. You shall consult your program supervisor prior to job changes.
3. If you intend to move out of your current district, you shall seek written approval from your Pretrial Diversion Supervisor in advance so that the appropriate transfer of program responsibility can be made.

4. You shall report to your Pretrial Diversion Supervisor as directed in ¶¶ 1-3 above and keep him or her informed of your whereabouts and travel.

5. You shall be permitted Internet access only as approved by your Pretrial Diversion Supervisor. You shall allow your Pretrial Diversion Supervisor to inspect any computer that you own or possess.

6. You shall attend psychiatric or psychological counseling and treatment as directed by the United States Probation Office.

7. You shall perform 100 hours of community service as approved by your Pretrial Diversion Supervisor.

8. By signing below, you hereby voluntarily abandon and relinquish all property seized by local, state or federal law enforcement agents during the investigation of this case. You hereby waive any and all right to the property, and agree to the forfeiture (18 U.S.C. § 2253/18 U.S.C. § 2254) and/ or the abandonment of said property. You also waive any and all right to the notice of the forfeiture (18 U.S.C. § 2253/18 U.S.C. § 2254) and/or the abandonment of the property. You agree not to contest that forfeiture or abandonment of this property.

9. You shall have no contact with children under the age of 18, including through letters, communication devices, audio or visual devices, visits, electronic mail, internet chat rooms, or any contact through a third party without the prior written consent of your probation officer.

10. You are prohibited from places where minor children under the age of 18 congregate, such as residences, parks, beaches, pools, daycare centers, playgrounds, and schools without the prior written consent of your probation officer.

11. You are to abstain from alcohol.

12. You will submit to random drug testing.

13. You are to refrain from any unlawful use or possession of controlled substances, and you are to participate in a program of inpatient or outpatient substance abuse therapy if directed by your probation officer.

DEFENDANT'S CERTIFICATION

I assert and certify that I am aware of the fact that the Sixth Amendment to the Constitution of the United States and Title 18, U.S.C., § 3161, *et. seq.*, provide that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. I also am aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the court may dismiss an indictment, information, or complaint for unnecessary delay in

presenting a charge to the grand jury, filing an information or in bringing a defendant to trial. I hereby request that the United States Attorney for the Northern District of Iowa defer any prosecution of me for violation of Title 18, U.S.C., § 2252A(a)(5)(B) for the period of twelve months (12), and to induce him to defer such prosecution I agree and consent that any delay from the date of this Agreement to the date of the initiation of the prosecution, as provided for in the terms expressed herein, shall be deemed to be a necessary delay at my request and I waive any defense to such prosecution on the ground that such delay operated to deny my rights under Rule 48(b) of the Federal Rules of Criminal Procedure, Title 18, U.S.C., § 3161, *et. seq.*, and the Sixth Amendment to the Constitution of the United States to a speedy trial or to bar the prosecution by reason of the running of the statute of limitations for a period of twelve (12) months which is the period of this Agreement.

I assert and certify that I understand that the Fifth Amendment, Rule 11(f) of the Federal Rules of Criminal Procedure and Rules 408 and 410 of the Federal Rules of Evidence, and perhaps other rules or provisions of law afford me certain protections with respect to incriminatory statements I make or sign in an effort to resolve the pending investigation. By signing the attached Statement of Facts, I waive all protections afforded me by the Fifth Amendment, Rule 11(f) of the Federal Rules of Criminal Procedure, Rules 408 and 410 of the Federal Rules of Evidence and/or any other rule or provision of law with respect to the Statement of Facts attached hereto.

I hereby state that the above has been explained to me. I understand the conditions of my pretrial diversion and agree that I will comply with them.

_____ Date

_____ Date

Counsel for

_____ Date

Assistant United States Attorney
Northern District of Iowa

_____ Date

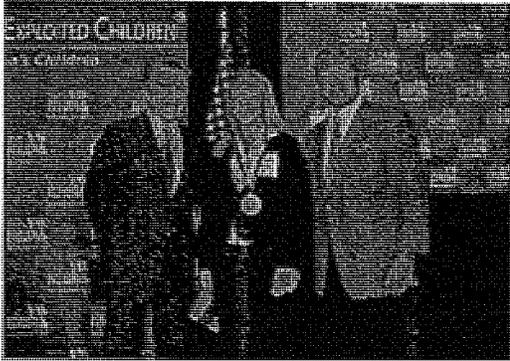
United States Probation Officer

MEMORANDUM

TO: Defenders
 FR: Amy Baron-Evans, Sara Noonan
 RE: Adam Walsh Act - Part I
 DA: October 19, 2006

The Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act" or "Act") was signed into law on July 27, 2006. It established a complex and onerous national sex offender registry law (which will be the subject of a forthcoming Adam Walsh Act - Part II), and made significant changes to sexual abuse, exploitation and transportation crimes, including creating new substantive crimes, expanding federal jurisdiction over existing crimes, and increasing (often by a factor of two or greater) statutory minimum and/or maximum sentences. The Act did away with the statute of limitations altogether for most sex crimes, placed unfair and unworkable restrictions on discovery in child pornography cases, created new barriers to and strict conditions for pretrial release, added searches without probable cause as a

discretionary condition of probation and supervised release for persons required to register as sex offenders, expanded the government's authority to take DNA from persons not convicted of any crime, and added a new provision for civil commitment of "sexually dangerous persons." It also enacted certain victim rights in state prisoner habeas proceedings and a right of sex crime victims to receive damages of \$150,000 in civil actions.



Rep. Mark Foley (R-FL), one of the bill's primary sponsors and (now former) Chair of the House Caucus on Missing and Exploited Children, photographed with Adam Walsh's father.

This paper gives a brief overview of the Adam Walsh Act and suggests *some* (certainly not all) legal challenges that can be raised to its provisions. The sex offender registry provisions and new offenses for persons required to register under federal or state law will be the subject of a further memo, Adam Walsh Act - Part II, to be distributed shortly. Please let us know of anything we've missed or misconstrued, and of any important developments in your cases that might be helpful to others.

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I. Changes to Crimes, Penalties and Procedures

A. New and Expanded Crimes

The Act establishes new crimes or expands federal jurisdiction over existing crimes in nine areas, including child abuse, kidnapping, obscenity, child pornography, use of the Internet to distribute obscenity or drugs, and record-keeping.

1. Expansions of Federal Jurisdiction

Felony Child Abuse and Neglect. The Act adds felony child abuse and neglect to the Major Crimes Act's list of offenses that are subject to federal prosecution when committed by an Indian against the person or property of another Indian or other person "within the Indian country." See 18 U.S.C. § 1153(a). Thus, felony child abuse or neglect within Indian country is now a federal crime, the precise definition and punishment of which depends on the law of the state in which the reservation is located. See 18 U.S.C. § 1153(b).

Like other aspects of the Adam Walsh Act, see Part I, B, *infra*, this expansion of the Major Crimes Act, if enforced, will have a disproportionate impact on the American Indian population. Though Indians constitute only about 1.5% of the population, they have the third highest rate of reported child abuse and neglect nationally.¹ In South Dakota, for example, almost half of all child abuse and neglect reports are for Indian children, despite the fact that Indians comprise only around 14% of the state's population. Keep in mind that Major Crimes Act offenses not defined and punished under federal statutes are defined and punished in accordance with state law. See 18 U.S.C. § 1153(b).

Kidnapping. The Act expands federal jurisdiction to reach any kidnapping in which the defendant crossed state lines or used an instrumentality of interstate commerce during the commission or in furtherance of the crime, even if the kidnapping itself is accomplished wholly intrastate. See 18 U.S.C. § 1201(a)(1). This provision will likely be applied to cases where the defendant used the Internet or made a telephone call during the course of the kidnapping, thereby effectively federalizing virtually all kidnapping offenses. See, e.g., *United States v. Giordano*, 442 F.3d 30, 39 (2nd Cir. 2006) (telephone, even when used on wholly intrastate basis, constitutes instrumentality of interstate commerce under 18 U.S.C. § 2425); *United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir. 2006) (Internet is an instrumentality of interstate commerce for purposes of 18 U.S.C. § 2252A(a)(2)(B) regardless of whether images were transmitted across state lines).²

Obscenity. The Act expands the obscenity statutes to reach anyone who produces obscene matter with the intent to transport the matter in interstate commerce for the purpose of selling or distributing it, 18 U.S.C. § 1465, as well as anyone who is engaged in the business of producing with the intent to distribute or sell obscene matter, 18 U.S.C. § 1466. The practical effect of these changes is to relieve the government of having to prove that the defendant actually transported, transferred or sold obscene material. Because of this, depending on the government's proof, a prosecution under either statute may raise Commerce Clause problems. See *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

You should also note that expanding sections 1465 and 1466 to cover the act of "producing" obscene material with intent to transport, transfer or sell will have a different impact on the statutory rebuttable presumptions depending upon the statute at issue. Under section 1465, the government would still have to prove that the defendant actually transported the obscene material in order to obtain the

¹ See Administration on Children, Youth and Families, *Child Maltreatment 2004*, Table 3-12 (2004), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf>.

² In addition to expanding federal jurisdiction, the Act establishes a new mandatory minimum sentence of twenty-five years for kidnapping a person under the age of eighteen. See 18 U.S.C. 3559(f)(2); Part I, B, *infra*.

benefit of the rebuttable presumption. This is not so for section 1466, which creates a rebuttable presumption only upon proof of an offer to sell or transfer, irrespective of whether the material was actually transported by the defendant.

2. New Crimes

a. Child Exploitation Enterprise

The Adam Walsh Act creates five new crimes relating to the sexual exploitation of children. One is the new "child exploitation enterprise," which carries a mandatory minimum of twenty years for any defendant who "violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons." Note that the list of predicate offenses includes sex trafficking involving an *adult* under section 1591(b)(1), which is perhaps a drafting error, and statutory rape, as well as rape, abusive sexual contact, kidnapping, possession of child pornography, and coercing or transporting a minor to engage in prostitution or other criminal sexual activity.

It is hard to tell how this statute will be used by prosecutors. Theoretically, it could encompass a fact pattern where a defendant used an Internet chat room on three separate occasions to solicit images involving sexually explicit depictions of a male and a female child from at least three other chat room participants, even if the defendant never actually possessed any child pornography at any time and even if the images discussed did not even exist. See 18 U.S.C. §§ 2252A(a)(3), 2252A(g)(2). It may be charged against people who did not themselves commit "a series of felony violations constituting three or more separate incidents" or know that they were members of a "child exploitation enterprise." If so, recall that the RICO statute withstood fair warning and vagueness challenges because it requires each defendant to commit a minimum of two criminal predicates that constitute a pattern of related and continuous acts of racketeering, in connection with a group associated for a common purpose.³ A statute violates the fair warning requirement of the Due Process Clause and is void for vagueness, if people of ordinary intelligence would not know that they were violating it and/or it invites arbitrary or discriminatory enforcement. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Kolendar v. Lawson*, 461 U.S. 352, 357 (1983); *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

As with all offense-based mandatory minimums, defense counsel can challenge the twenty-year mandatory minimum on constitutional grounds, including separation of powers, equal protection, due process, and grossly disproportionate punishment. See Part I, B, *infra*.

b. Internet-Based Crimes

Two new crimes require use of the Internet as an element. The first carries a ten year maximum penalty for any person who knowingly embeds words or digital images into the source code of a website (meaning both the viewable and nonviewable content of a webpage) with the intent to deceive a person into viewing obscene material. See 18 U.S.C. § 2252C(a). If the intent was to deceive a minor into viewing material harmful to minors, the maximum penalty is twenty years. *Id.* at § 2252C(b).

The Act also criminalizes the knowing use of the Internet to distribute a date rape drug with knowledge or reasonable cause to believe either (A) that the drug would be used to engage in "criminal sexual conduct" or (B) that the person receiving the drug is not an "authorized purchaser," subject to a twenty-year maximum. See 21 U.S.C. § 841(g)(1)(A)-(B).

Section 841(g) lists three specific drugs designated as "date rape drugs" by Congress: gamma

³ See, e.g., *United States v. Bennett*, 984 F.2d 597, 605-06 (4th Cir. 1993); *United States v. Dischner*, 974 F.2d 1502, 1510-11 (9th Cir. 1992); *United States v. Swiderski*, 593 F.3d 1246, 1249 (D.C. Cir. 1979); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975).

hydroxybutyric acid ("GHB") and its analogues, ketamine, and flunitrazepam. See 21 U.S.C. § 841(g)(2)(A)(i)-(iii). Note that ketamine is not listed in the Drug Quantity Table in U.S.S.G. § 2D1.1. It is a Schedule III drug, sometimes known as "Special K." See 21 C.F.R. 1308.13. Schedule III drugs have a marijuana equivalence of 1 gram per unit, capped at 59.99 kilograms of marijuana. See Drug Equivalency Table.

Section 841(g) also authorizes the Attorney General to designate "any substance" as a date rape drug pursuant to the rulemaking procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553. See 18 U.S.C. § 841(g)(2)(A)(iv). A defendant charged under section 841(g) for distributing any substance so classified by the Attorney General can argue that section 841(g)(2)(A)(iv)'s delegation of authority is a violation of the non-delegation doctrine. "Congress is manifestly not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). It may only leave to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." *Id.* This is possible only where Congress "lay(s) down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform" *Touby v. United States*, 500 U.S. 160, 165 (1991) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (brackets in original) (upholding 21 U.S.C. § 811, which sets forth specific steps pursuant to which the Attorney General can amend the controlled substance schedules in the Controlled Substances Act). In section 841(g), Congress has not defined "date rape drug" or otherwise provided the procedural safeguards that saved section 811 from being an unconstitutional delegation. *Cf. Touby*, 500 U.S. at 165 (discussing numerous safeguards set forth in section 811, only one of which addressed the procedural mechanism of agency rulemaking).

You should look at *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), where the Supreme Court held that the Attorney General had exceeded his rule-making authority under the Controlled Substances Act in criminalizing doctor-assisted suicide because it was beyond his expertise and inconsistent with the statutory purpose and design, and *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), where the Court upheld the Controlled Substances Act as applied to intrastate distribution of marijuana for medical reasons against a Commerce Clause challenge. These cases do not address the non-delegation doctrine, but you may find something relevant there, whether helpful or harmful. That is beyond the scope of this paper.

c. Record-Keeping Requirements

Finally, the Adam Walsh Act creates two new crimes related to record-keeping requirements for those working in the sex industry. The first expands 18 U.S.C. § 2257's existing record-keeping requirements, which require that anyone producing visual depictions of "actual sexually explicit conduct" maintain records on each performer's name, date of birth, and other identifying information, to include depictions consisting of digital images or digitally-manipulated images of real people. It also requires information regarding the location of those records to be posted on every page of a website, and adds the refusal to permit the Attorney General to inspect the records as grounds for criminal liability. The second statute applies section 2257's requirements and criminal provisions to anyone who produces images of "simulated sexual conduct." See 18 U.S.C. § 2257A. Penalties include imprisonment of up to one year for a first offense, and a minimum of two and maximum of ten years for subsequent offenses. Unlike section 2257, section 2257A also provides for a five-year maximum penalty if a defendant violates section 2257A's record-keeping requirements in an effort to conceal a substantive offense involving child pornography or sex trafficking. See *id.* at § 2257A(i)(2).

d. Sex Offender Registry Crimes

The Adam Walsh Act established a new offense of Failure to Register as a sex offender, with a 10-year maximum, or a consecutive mandatory minimum of 5 years for committing a crime of violence while being required to register and failing to register. See 18 U.S.C. § 2250. It also created a new consecutive mandatory minimum of 10 years for being required by Federal or other law to register as a sex offender and committing an enumerated felony offense involving a minor, including kidnapping and various sex offenses. See 18 U.S.C. § 2260A. These offenses will be discussed in more detail in the forthcoming Adam Walsh Act - Part II.

B. New Penalties

In addition to the changes described above, the Adam Walsh Act creates a staggering number of sentence increases – including new or higher mandatory minimums for more than fifteen separate offenses.

1. New Mandatory Minimums and Statutory Maximums

- New mandatory minimums for a “crime of violence against the *person* of an individual who has not attained the age of 18.” Murder carries a mandatory minimum of life for death-eligible murder and thirty years otherwise. 18 U.S.C. § 3559(f)(1). Kidnapping and maiming carry a mandatory minimum of 25 years. *Id.* at § 3559(f)(2). All other crimes of violence against the person of a minor resulting in serious bodily injury or committed with a dangerous weapon (which is not defined in the code and therefore could be anything from a firearm to a foot to a pencil) carry a mandatory minimum of 10 years in prison. *Id.* at § 3559(f)(3).
- New mandatory minimum of 15 years for sex trafficking accomplished through force, fraud, or coercion or involving a minor under 14 (no mandatory minimum in former statute); statutory maximum remains at life. 18 U.S.C. § 1591(b)(1). For sex trafficking without force, fraud, or coercion involving a person between 14 and 17, the Act imposes a new mandatory minimum of 10 years and increases the statutory maximum to life. *Id.* at § 1591(b)(2).
- New mandatory minimum of 30 years for aggravated sexual abuse where the victim is less than 12, or where the victim is between 12 and 15 (and is at least 4 years younger than the defendant) and the crime is accomplished by force, threat, rendering the victim unconscious, or impairing the victim’s ability to appraise or control conduct (no mandatory minimum in former statute). See 18 U.S.C. § 2241(c).
- Sexual abuse now carries a statutory maximum of life, up from twenty years. See 18 U.S.C. § 2242.
- Tripled the mandatory minimum for sexually abusing a ward to 15 years, see 18 U.S.C. § 2243(b), up from the 5-year mandatory minimum Congress enacted seven months prior in the Violence Against Women Act.
- New statutory maximum of life (up from 10 years) for sexual contact that would have violated section 2241(c) had it been a sexual act. See 18 U.S.C. § 2244(a)(5).
- Doubled the mandatory minimum for coercing or transporting a minor to engage in criminal sexual activity to 10 years (up from 5) and increased the statutory maximum from 30 years to life. See 18 U.S.C. §§ 2422(b), 2423(a).
- Increased mandatory minimum for child pornography-related charges to thirty years if death results. See 18 U.S.C. § 2251(e).
- More than doubled the statutory maximum to 10 years (previously 4 years) for using a misleading domain name on the Internet with intent to deceive a minor into viewing material harmful to minors. See 18 U.S.C. § 2252B.
- Increased penalties for using a minor outside of the United States to produce a sexually explicit depiction of a minor with the intent that it be imported into the United States to a minimum of 15, maximum of 30 years for a first offense (formerly no minimum, 10-year maximum), a minimum of 25, maximum of 50 years for second offense, and a minimum of 35, maximum life for subsequent offenses (formerly no minimum, 20-year maximum). See 18 U.S.C. § 2260(c)(1). Transporting, receiving, shipping, distributing, selling or

possessing a sexually explicit depiction of a minor with the intent that it be imported into the United States now carries a minimum of 5, maximum of 20 years for the first offense, and a minimum of 15, maximum of 40 years for subsequent offenses. *Id.* at § 2260(c)(2).

- Increased punishment for failure to report child abuse from a class B misdemeanor to a Class A misdemeanor, meaning it is now punishable by up to 1 year imprisonment. See 18 U.S.C. §2258.
- Extended 18 U.S.C. § 2245 to authorize the death penalty where the defendant murders a person in the course of committing an enumerated sex crime. Remarkably, despite adding new predicate offenses to section 2245, the Act added a new requirement that the defendant commit "murder" in the course of committing the predicate offense. This narrows the statute from its prior version, which had authorized the death penalty merely if "death resulted."

2. Potential Challenges to Mandatory Minimums

Given the courts' growing discomfort with existing mandatory minimums (and negative attention in the press), defense counsel should raise constitutional challenges to the new and increased mandatory minimums contained in the Adam Walsh Act. Obviously, these arguments are not slam dunk winners, but you should raise and preserve them (or others that come to mind) nonetheless.

The following arguments are for offense-based mandatory minimums, *i.e.*, where the mandatory minimum is based on jury-found facts or the defendant's guilty plea. Mandatory minimums based on judicial factfinding (which the Adam Walsh Act does not contain) should be challenged on the basis that *Harris v. United States*, 536 U.S. 545 (2002) is no longer good law. See Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule Harris*, 18 Fed. Sent. Rep. 4, 2006 WL 2433749 (April 2006).

Eighth Amendment -- Mandatory minimums *should* violate the Eighth Amendment where the harshness of the penalty is grossly disproportionate to the gravity of the offense. See *Ewing v. California*, 538 U.S. 11, 20 (2003) (O'Connor, J., concurring in the judgment) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (Kennedy, J., concurring in part and concurring in the judgment)). District courts and individual appeals court judges have increasingly expressed impassioned disgust over the irrational, inhumane and absurd results wrought by mandatory minimum and consecutive mandatory minimum sentences, though no federal court has yet refused to impose or uphold them. See *United States v. Hungerford*, ___ F.3d ___, 2006 2923703 ** 5-9 (9th Cir. Oct. 13, 2006) (Reinhardt, J., concurring in the judgment) (concurring in the judgment affirming 159-year sentence under 924(c) for mentally ill 52-year-old woman with no record who never touched a gun because precedent required it, but the sentence is cruel, unjust, irrational and shocks the conscience); *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah Nov. 16, 2004) (sentence for twenty-four-year-old first offender to a consecutive mandatory minimum term of 55 years based on three convictions in the same trial for possessing a firearm was "grossly disproportionate . . . unjust, cruel, and even irrational" but court nevertheless imposed sentence), *aff'd* 433 F.3d 738 (10th Cir. Jan. 9, 2006); *United States v. Ezell*, 417 F.Supp.2d 667, 672-73 (E.D. Penn. 2006) (sentence of 125 years for six armed robbery convictions was "unduly harsh" where guideline range would be between 168 and 210 months but court nevertheless imposed sentence); *United States v. Ciskowski*, 430 F.Supp.2d 1283 (M.D. Fla. 2006) (similar concerns, same result).

In what may be a harbinger of federal constitutional jurisprudence to come, however, the Arizona Supreme Court held in 2003 that the state's mandatory consecutive minimum law subjected the defendant to grossly disproportionate punishment and was unconstitutional as applied. See *State v. Davis*, 79 P.3d 64 (Ariz. 2003) (vacating 52-year mandatory sentence for engaging in sexual intercourse with two different pre-pubescent girls based on underlying facts), *cert. denied*, *Arizona v. Davis*, 541 U.S. 1037 (2004); *but see State v. Berger*, 134 P.3d 378, 385 (Ariz. 2006) (upholding 200-year sentence resulting from mandatory 10-year consecutive sentences imposed for twenty counts of possession of child pornography where defendant's conduct manifested a long-term interest in gruesome exploitation of children). *Davis* and *Berger* together demonstrate that the underlying facts are *critical* when considering a fair and appropriate sentence for a sex crime. It is easy to imagine, for example, a defendant who on several

occasions viewed child pornography, but did not purposefully target (through search terminology or otherwise) or actively download it, being subjected to a child exploitation enterprise charge under section 2252A(g) by an over-zealous prosecutor eager to try out the new law (and its accompanying mandatory minimum of 20 years for a first-time offender). In such a case, where the defendant lacks virtually all of the characteristics of a child predator (at which Adam Walsh is purportedly aimed), there may be some room to successfully argue that the Act imposes a "grossly unfair" sentence as applied to his particular case.

Equal Protection -- Congress has been informed for years that mandatory minimums are costly, have little effect on crime control, and have a disparate impact on minorities.⁴ Justice Kennedy recently spoke out against mandatory minimums as unjust and unwise.⁵ Even the Director of the Office of National Drug Control Policy told Congress that the current policy of imprisoning low-level offenders for years is ineffective in reducing crime and only breaks generation after generation of poor minority young men.⁶

The evidence is clear that federal sexual abuse prosecutions have a disproportionate impact on Native Americans, who comprise only 4.5 percent of all federal defendants but 56 percent of those sentenced for sexual abuse.⁷ Between October 2005 and June 2006, the average sentence for sexual abuse was 102.3 months, the third highest of all, with only murder and kidnapping higher.⁸ The vast majority of non-Indians who commit similar offenses do so under circumstances in which there is no federal jurisdiction, and therefore are subject to prosecution and sentencing only in state court, where they are subject to significantly lower sentences. In November 2003, the Native American Advisory Group reported (based on data obtained by the Sentencing Commission) that the average sentence for state sex offenses in South Dakota was 81 months, for state sex offenses in New Mexico was 25 months, and for state sex offenses in Minnesota was 53 months.⁹ The Adam Walsh Act's 30-year mandatory minimum for § 2241(c) (and any increases the Sentencing Commission adopts for sexual abuse crimes in response to Adam Walsh) will exacerbate the disparate impact on this group. Given the mounting evidence against mandatory minimums in general, and the well documented disparate impact on Indians of federal sexual

⁴ See Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 21-22 (2004); U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* (May 2002); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 103rd Cong., 1st Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, *Justice on Trial* (2000).

⁵ Report of the ABA Justice Kennedy Commission, Summary of Recommendations, <http://www.abanet.org/media/kencomm/summaryrec.pdf>; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

⁶ Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

⁷ U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 4 (2005), available at <http://www.ussc.gov/ANNRPT/2005/table4.pdf>.

⁸ Sentencing Commission, Preliminary Quarterly Data Report, Table 18 (FY 2006 through June 30, 2006), http://www.ussc.gov/Blakely/Quarter_Report_3Qrt_06.pdf.

⁹ See Report of the Native American Advisory Group at 21-22 & n.38 (Nov. 4, 2003).

abuse prosecutions in particular, mandatory minimums should be challenged as failing even the rational basis test under the Equal Protection Clause.

Due Process Right to Individualized Sentencing – The death penalty is prohibited as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and the sentencer in a capital case must be able to give effect to all mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 602-04 (1978). These principles may be able to be extended to mandatory minimum sentencing, at least where the result is mandatory life, or effectively mandatory life.

Separation of Powers – The prosecutor has sole power to charge an offense that carries a mandatory minimum sentence and sole power to lower that sentence. Offense-based mandatory minimums therefore unite the power to prosecute and the power to sentence within the Executive Branch, aggrandizing the power of the Executive and encroaching upon the Judiciary's constitutionally assigned sentencing function. See *Mistretta v. United States*, 488 U.S. 361, 382, 391 n.17 (1989). (In enticement and certain child pornography cases, the government also creates the offense. AFPDs Dennis Terez and Vanessa Malone recently argued to the Sixth Circuit that the vast majority of these cases are government stings in which no actual minor is involved. It may be wise for Defender Offices to start keeping track of the number of sting v. real minor cases, as it is not a statistic that the government is likely to reveal.)

An article by Professor Rachel Barkow argues, *inter alia*, that "the danger of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a sufficient judicial check. That is, . . . the key problem with these laws is their *mandatory* nature, not whether they set a floor or ceiling. Thus, under a formalist analysis that looked to the criminal jury's role in the separation of powers, [which Prof. Barkow encourages], the Court would reject not only those laws that require judges (not juries) to increase a defendant's maximum sentence but also those laws that require judges (not juries) to set a minimum sentence."¹⁰

C. Other Lowlights, Other Challenges

1. Statute of Limitations

There is no longer a statute of limitations for any felony listed in Chapter 109A (Sexual Abuse), Chapter 110 (Sexual Exploitation and Other Abuse of Children) except for violations of the record-keeping requirements set forth in sections 2257 and 2257A, and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), or for charges under sections 1201 (kidnapping of a minor) or 1591 (sex trafficking).

This will violate the *Ex Post Facto* Clause in any case in which the statute of limitations ran before the law was enacted. See *Stogner v. California*, 539 U.S. 607, 611, 617-18 (2003) (holding that application of a California law permitting prosecution for sex-related child abuse within one year of the victim's report to police to an offense whose prosecution was time-barred at the time the law was enacted was unconstitutionally *ex post facto*).

The lack of any statute of limitations for sex crimes can also be challenged under the Equal Protection Clause. Statutes of limitations "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). Currently, the most serious and difficult to detect offenses in the criminal code are subject to a five-year statute of limitations. See 18 U.S.C. § 3282. Terrorism offenses are subject to an eight-year statute of limitations. See 18 U.S.C. § 3286. There seems to be no rational justification for subjecting defendants in sex offense cases to extraordinary unfairness.

The lack of any statute of limitations may create a due process problem, assuming that the

¹⁰ Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1043 (Feb. 2006).

defendant proves actual prejudice to the defense *and* the reason for the delay is not sufficiently justifiable. See *United States v. Lovasco*, 431 U.S. 783, 789-90 (1979) (actual prejudice from a delayed charge is not enough to establish a due process violation). Most circuits, however, have interpreted *Lovasco* to require a showing that the government acted in bad faith in delaying the indictment.

2. Bail

Added to the list of offenses for which the court must hold a hearing upon motion of the government to determine whether there are conditions of release that will reasonably assure the person's appearance and the safety of any person and the community are "any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any dangerous weapon [not defined anywhere], or involves a failure to register [as a sex offender] under section 2250." See 18 U.S.C. § 3142(f)(1)(E). In regard to the "nature and circumstances of the offense charged," the court must now consider "whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device." See 18 U.S.C. § 3142(g)(1).

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, 2425, or 2250 (failure to register), any pretrial release order must contain a condition of electronic monitoring and each of the conditions at (iv)-(viii). *Id.* at § 3142(c)(1). Because the Act would impose these requirements without a finding that it is necessary to assure the defendant's appearance or the safety of anyone, this requirement may violate due process. See *United States v. Salerno*, 481 U.S. 739, 749 (1987) (upholding pretrial detention against due process challenge only because the Bail Reform Act specifically requires individualized assessment and proof of defendant's dangerousness by clear and convincing evidence).

Perhaps spurred on by the Supreme Court's recent decision in *Samson v. California*, 126 S.Ct. 2193 (2006) (suspicionless search of parolee pursuant to written consent does not violate Fourth Amendment), we hear that prosecutors are demanding consent to warrantless searches as a condition of their agreement to pretrial release. The Adam Walsh Act did not create such a condition. In *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), the Ninth Circuit held that this was an "unconstitutional condition," and thus warrantless searches imposed as a condition of pretrial release require a showing of probable cause, despite the defendant's consent. *Scott* appears to be the only case in which this issue has been decided.

3. DNA Collection from Persons Arrested, Facing Charges, Convicted, or Detained, regardless of Type of Offense.

Since 2001, BOP has been required to collect a DNA sample from each individual in its custody who "is, or has been" *convicted* of a "qualifying Federal offense," which are "the following Federal offenses, as determined by the Attorney General:" any felony, any offense under chapter 109A, any crime of violence as defined in 18 U.S.C. § 16, or any attempt or conspiracy to commit such an offense. See 42 U.S.C. 14135a(a)(1), (d) (2005). The AG promulgated a regulation designating offenses that appear to be within the listed categories (though we have not checked). See 28 C.F.R. § 28.2. Failure to cooperate in such collection is a misdemeanor. See 42 U.S.C. 14135a(a) (5) (2005).

Effective January 5, 2006 (through the Violence Against Women Act (VAWA)), Congress added to the above that the "Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested or from non-United States persons who are detained under the authority of the United States." Demonstrating Congress' increasing willingness to hand over legislative power to the Executive at the expense of individual rights, the AG is apparently free to collect DNA from these unconvicted persons regardless of the type of offense of which they have been accused. The only limit is that they must be "in custody." Failure to cooperate in such collection is a misdemeanor. See 42 U.S.C. 14135a(a)(1)(A), (B), (a)(5), (d) (2006).

The Adam Walsh Act broadened this yet again. The Attorney General may collect DNA samples,

"as prescribed by the Attorney General in regulation," from individuals who are "facing charges, or convicted." Failure to cooperate in such collection is a misdemeanor. See 42 U.S.C. 14135a(a)(1)(A), (B), (a)(5), (d) (as amended July 27, 2006). "Facing charges" apparently adds persons who are currently charged by indictment, information or complaint, but are not currently under arrest. "Convicted" apparently adds persons convicted of offenses that are not felonies, violations of chapter 109A, or crimes of violence. Again, they must at least be "in custody."

It does not appear that the Attorney General has promulgated any regulation to implement the broadened DNA collection power created by VAWA and SORNA. Until a regulation is promulgated, it should be argued that the power may not be exercised.

DNA collection has been upheld against Fourth Amendment challenge because the individuals from whom samples were collected were already proven guilty of a crime, thus heightening the government's legitimate interest in monitoring them and diminishing their expectation of privacy. *E.g., United States v. Kincade*, 379 F.3d 813, 833-36 (9th Cir. 2004) (en banc). See also *Samson v. California*, 126 S. Ct. 2193, 2197-2202 (2006) (upholding suspicionless search of parolee based on diminished liberty interest at least where parolee was clearly informed this would be a condition of parole, and state's interest in supervision). This rationale does not apply to persons "arrested" or "facing charges." Nor should the "special needs" test for suspicionless searches support DNA collection under this law, since a general interest in crime control does not constitute a "special need." *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Illinois v. Lidster*, 540 U.S. 419 (2004).

4. Discovery

The Act requires that any material that "constitutes" child pornography "remain in the care, custody, and control of either the Government or the court." It is not to be copied, photographed, duplicated or otherwise reproduced for defense counsel, so long as the government provides "ample opportunity for inspection, viewing, and examination." See 18 U.S.C. § 3509(m)(1)-(2).

Note: This issue is being fully litigated before Judge Robert Payne in *United States v. Knellinger*, No. 3:06CR00126 (E.D. Va.) with *amicus* briefing by the Federal Defender Office in E.D. Va. and NACDL (due October 19, 2006), and a hearing the week of November 6, 2006, which will include expert testimony from national technical and legal experts. Judge Payne has ordered *amici* to address whether and the extent to which section 3509(m) restricts the rights of defendants under the Due Process Clause, the Confrontation Clause, the Compulsory Process Clause, and the right to Assistance of Counsel. Defense counsel in the case, Ian Friedman, has consented to giving out his phone number and email address for those who want to obtain copies of briefs and (possibly) transcripts: ifriedman@inflaw.com, (216) 928-7700. Without having reviewed those materials, our thoughts are as follows.

If the concern were really to prevent distribution of child pornography as the Act claims, that concern could easily be remedied through a protective order from the court limiting disclosure and requiring all copies to be returned at the end of the case. In fact, you can argue that a protective order is consistent with section 3509(m), in that the evidence would remain in the "care, custody, and control" of the court at all times via the protective order.

The alternative to a protective order is not to accept compliance with the Act – which would hinder the preparation of the defense by forcing counsel to review often highly technical evidence such as hard drive images without their own equipment and constrained by time, and would require divulging the identity of potential defense experts before counsel even has an opportunity to know whether the expert will be helpful or harmful to the case - but to challenge its constitutionality.

In cases before the Adam Walsh Act, federal courts found that restrictions on providing copies of alleged child pornography to defense counsel would hinder the preparation of the defense and thus ordered the material produced pursuant to Rule 16. See, e.g., *United States v. Fabrizio*, 341 F.Supp.2d 47 (D. Mass. 2004) (Rule 16 requires that computer image be produced to enable defense experts to conduct thorough analysis of computer records and to recreate government's analysis); *United States v. Hill*, 322 F.Supp.2d 1081 (D.C. Cal. 2004). Since the Act nullifies Rule 16 with respect to this kind of evidence,

defense counsel should seek a ruling that the "no discovery" provision is unconstitutional. See, e.g., *Westerfield v. Superior Court*, 121 Cal.Rptr.2d 402, 404-05 (Cal. App. Ct. 2002) (Construing state statute prohibiting the dissemination of child pornography to prohibit defense counsel from receiving copies of alleged pornographic images "exalts absurdity over common sense." "[R]equiring the defense to view-and apparently commit to memory-the 'thousands' of images at the computer crimes office obviously impacts Westerfield's right to effective assistance of counsel and his right to a speedy trial.").

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that due process required that a defendant be given funds to retain a psychiatrist in order to raise a defense of mental impairment. *Id.* at 84. Underlying the Court's holding was the principle that, in some cases, a "fair opportunity" to defend oneself includes the opportunity to present expert testimony. *Id.* at 74-76. Of course, the first step toward presenting expert testimony is for the expert to form an opinion, and to do that, the expert needs to examine the evidence. In defending a charge involving child pornography, this means that an expert will need to examine the hard drive in order to determine, for example, whether the images are in fact child pornography, were purposely downloaded, or were placed there by someone else, a time-consuming process that requires highly specialized forensic equipment. *Fabrizio*, 341 F.Supp.2d at 49. An expert will also want to recreate the government's search to identify challenges to its evidence. *Id.*

Forcing defense experts and counsel to conduct their work on government computers would unfairly constrain them in terms of time and equipment. It would leave a roadmap of the process and its results which the government could then access for its own trial preparation. And it would necessarily force defendants to disclose to the government the fact that an expert had been retained to assist the defense investigation. These effects likely violate the Fifth Amendment Due Process Clause and the Sixth Amendment right to effective assistance of counsel. The right to effective assistance of counsel includes the right to have counsel conduct a reasonable investigation. See *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Due process includes the right to use an expert where necessary to assist with that investigation. See *Smith v. McCormick*, 914 F.2d 1153, (9th Cir. 1990) (due process and equal protection right to psychiatric assistance set forth in *Ake* "means the right to use the services of the psychiatrist in whatever capacity defense counsel deems appropriate – including to decide, with the psychiatrist's assistance, *not* to present to the court particular claims of mental impairment") (emphasis added). Obviously, defense counsel cannot use an expert to assist in understanding what arguments *not* to present – and thus cannot adequately investigate possible defenses – if the identity of all defense experts is automatically disclosed to the government well before they have even had the opportunity to formulate an opinion. Indeed, requiring defense counsel to disclose an expert's identity necessarily trammels on the right to maintain confidentiality over attorney work product: "[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The Court in *Ake* implicitly recognized this in referring to the indigent defendant's right to "make an *ex parte* threshold showing" that expert psychiatric testimony will be relevant in his or her case. See *Ake*, 470 U.S. at 82-83 (emphasis added); see also *Williams v. State*, 958 S.W.2d 186, 193-96 (Tex. Crim. App. 1997) (right to *ex parte* application for expert funds grounded in rights to due process and attorney work product). Enforcement of the Act would thus violate defendants' due process right to have an expert assist in their defense under *Ake*, along with their right to the effective assistance of counsel in investigating viable defenses under *Strickland*.

Finally, enforcement of section 3509 would violate the presumption of innocence by assuming that what the government alleges is child pornography is, in fact, child pornography. Cf. *United States v. Turner*, 367 F.Supp.2d 319, 325-26 (E.D. N.Y. 2005) (identifying "crime victims" for purposes of according them rights under the Crime Victim Rights Act before there is a conviction would infringe upon the defendant's presumption of innocence).

Defense counsel should raise all of these issues with the court, submit a strong expert affidavit setting forth what investigation needs to be done in the case and why it cannot reasonably be done at a government office, and request access to copies of the evidence pursuant to a protective order. See *Fabrizio*, 341 F.Supp.2d at 48-49.

5. Probation/Supervised Release

For a defendant required to register under the Sex Offender Registration and Notification Act (to be covered in Adam Walsh Act Part II), it is now a discretionary condition of probation or (if the person is also a "felon") of supervised release, that s/he submit his/her person, property, house, residence, vehicle, papers, computer, electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation/supervised release or unlawful conduct, *and* otherwise in the lawful discharge of the officer's duties. See 18 U.S.C. §§ 3563(b)(23); 3583(d)(3).

6. Sex Offender Management and Treatment Programs

BOP is required to make available "appropriate treatment to sex offenders who are in need of and suitable for treatment," including both sex offender management programs and sex offender treatment programs. See 18 U.S.C. §3621(f)(1). These are not the same. Sex offender management programs monitor sex offenders' mail, phone calls, and behavior for things that BOP deems inappropriate for someone convicted of a sex crime. They do not provide treatment or counseling, do not count towards lower security classifications, and do nothing to protect incarcerated sex offenders from the general prison population. Keep this in mind in case the government tries to sell the court a bill of goods at sentencing that BOP's sex offender management program will provide "treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D).

While sex offender treatment programs offer therapeutic help to incarcerated sex offenders, at present BOP has only one such program. It is located in Butner, North Carolina and has only 112 beds.¹¹ This is far from home for most of the Indian population who comprise the majority of federal sex abuse offenders. Unless and until BOP creates more sex offender treatment programs, prison will continue to offer little to nothing in the way of rehabilitation and treatment for sex offenders.

Counsel should be aware that the sex offender treatment program requires participants to admit guilt as a precondition to entering the program, something defendants with active appeals cannot do, and, apparently, to admit other sexual misconduct in the course of treatment.¹²

7. Civil Commitment

For any person who is in the custody of the Bureau of Prisons *or* deemed incompetent *or* against whom all criminal charges have been dismissed solely because of the person's mental condition, the Attorney General and/or the Director of the Bureau of Prisons may certify that the person is a "sexually dangerous person." See 18 U.S.C. § 4248(a). Under the Act, "sexually dangerous" means that the defendant has engaged or attempted to engage in sexually violent conduct or child molestation and that he suffers from a serious mental illness, abnormality or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation if released. See 18 U.S.C. § 4247(a)(5)-(6). The Act does not set forth any standards upon which the Attorney General or the Director must base their certification of a person's "sexual dangerousness" beyond this definition.

Once a certificate has been filed, the defendant is entitled to an adversarial hearing, but must

¹¹ See Statement of Andres E. Hernandez before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives at 1-2, available at <http://energycommerce.house.gov/108/Hearings/09262006hearing2039/Hernandez.pdf>. See also Legal Resources Guide to the Bureau of Prisons at 33-34, available at http://www.bop.gov/news/PDFs/legal_guide.pdf.

¹² Statement of Andres E. Hernandez at 2-3. *And* Dr. Hernandez keeps at least data on the number of unreported sex crimes that participants admit in the course of treatment. He does this for scientific research purposes, but one wonders if and when he will be required to turn specific admissions over to law enforcement.

remain in the custody of either the Attorney General or the Bureau of Prisons pending resolution of the issue. See 18 U.S.C. §§ 4247(d), 4248(a)-(b). The court is authorized to order that a psychiatric or psychological assessment examination be conducted and a report submitted before the hearing. See 18 U.S.C. § 4248(b). If, after the hearing, the court finds by clear and convincing evidence that the defendant is sexually dangerous, the Attorney General must either commit him to state custody for treatment or place him in a "suitable facility" until either the state agrees to take him or he no longer qualifies as "sexually dangerous." See 18 U.S.C. § 4248(d). This finding and the subsequent discharge of the commitment can be made only by order of the court and only when the director of the facility to which the defendant has been committed certifies that he is no longer sexually dangerous. If the government or the court wishes, a hearing on the matter must be held prior to discharge, after which the court can order the defendant discharged only upon a finding by a preponderance of the evidence that the person will not be sexually dangerous to others if released. See 18 U.S.C. § 4248(e)(1). Alternatively, a person may be conditionally discharged under the same procedures subject to the defendant's compliance with a specific treatment regimen; he will then be subject to arrest and evaluation following his release if probable cause exists to believe that he is not following the prescribed treatment regimen. See 18 U.S.C. §§ 4248(e)(2), 4248(f).

The Act also increases the time in which a person can be deemed incompetent. Whereas section 4241 used to allow competency to be raised at any time prior to sentencing, it now allows it to be raised at any time after the commencement of any term of probation or supervised release and prior to the completion of the sentence, which means that the government can wait until a defendant has finished serving his prison term to move for a competency (or "sexually dangerous") determination. See 18 U.S.C. § 4241(a).

Importantly, if charges against a defendant who has been committed to a facility are dismissed for reasons not related to his mental condition, and the director of the facility certifies that the defendant is sexually dangerous, the state in which the person is domiciled or was tried has 10 days to initiate state civil commitment proceedings. See 18 U.S.C. § 4248(g). Otherwise, the person must be released. See *id.*

8. Victim Rights

The Act permits civil actions brought by minor victims of sex crimes regardless of whether the person suffered an injury while he or she was a minor, and triples the statutory damages from \$50,000 to \$150,000. See 18 U.S.C. § 2255(a).

It also purports to permit victims certain rights in state prisoner habeas proceedings: the right not to be excluded, the right to be reasonably heard, the right to proceedings free from unreasonable delay, and the right to be treated with fairness and respect. See 18 U.S.C. § 3771(b)(2)(A). The right not to be excluded and the right to be reasonably heard apply only in "public" court proceedings. In most habeas cases, there will be one or two public hearings at most. If it is an evidentiary hearing, a victim in a rare case *may* be a fact witness but otherwise will have nothing relevant to say. This is because habeas proceedings involve the legal question of whether the petitioner is in custody in violation of the Constitution or laws of the United States. Victim allocation is not relevant to that question. Thus, an asserted right to be heard will typically not be "reasonable" within the meaning of section 3771(b)(2)(A). Habeas counsel should be prepared to object on relevance grounds to a request to be heard from a victim or victim advocate. See *United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005) (holding that victim's proposed testimony at a detention hearing was not relevant to the issues).

It is unclear whether the right to proceedings free of unreasonable delay applies only to "public" proceedings. If not, victims can cause problems for habeas petitioners by filing petitions for mandamus. For some insights on mandamus proceedings and other aspects of the Crime Victims' Rights Act, see Amy Baron-Evans, *Some Issues Likely to Arise Under the Crime Victim Rights Act* (Oct. 3, 2006), available at www.fd.org.

9. Forfeiture

Property subject to criminal forfeiture for offenses involving obscene material, child pornography, or using misleading domain names, includes the obscene or pornographic material, any property constituting

or traceable to gross profits from the offense, and any property constituting or traceable to the means for committing or promoting the offense. See 18 U.S.C. §§ 1467, 2253. Criminal forfeiture is now governed by the procedures set forth in 21 U.S.C. § 853, *see id.*; civil forfeiture is governed by Chapter 46, *see* 18 U.S.C. § 981 *et seq.*

10. Rules of Evidence

The Act directs the Rules Committee to study the "necessity and desirability" of amending the Federal Rules of Evidence to remove the confidential marital communications privilege and the adverse spousal privilege in any case in which a spouse is charged with a crime against a child of either spouse or any child under the custody or control of either spouse. It is unclear at this time what action if any will be taken with respect to amending the Rules. If you have any insights or examples that might be presented to the committee in opposition to such a change, please let us know.

USE OF POLYGRAPHS

PRESENTED BY

**JANE KELLY
ASSISTANT PUBLIC
DEFENDER**

AND

**TINA DEBBAN
INVESTIGATOR, FPDO**

Use of Polygraphs

Federal Criminal Law and Procedure
Drake Law School Legal Clinic
November 30, 2006

1. Contractual Agreement for Polygraph Examination (Draft)
2. United States Attorney's Manual, 9-13.300 Polygraphs - Department Policy
3. *United States v. Scheffer*, 523 U.S. 303 (1998)
4. Eighth Circuit Case Law

Contractual Agreement for Polygraph Examination

Tina M. Debban, investigator for the Iowa Federal Defender's office and certified polygraph examiner (Examiner), agrees to administer a polygraph examination for Attorney _____ and his/her client _____ in connection with the federal criminal charge(s) currently pending against the client in case number _____.

The polygraph examination will be administered under the following terms:

1. This service is provided to attorneys who have been appointed by the court to represent a criminal defendant in federal court under the Criminal Justice Act at no cost to the attorney or to the defendant that attorney represents.
2. Prior to the administration of the polygraph examination, the attorney requesting the polygraph examination and the Federal Defender's office will do their best to determine whether any conflict of interest exists that would prevent the Examiner from conducting the examination. If any such conflict exists, as determined by either the attorney requesting the examination or the Federal Defender's office, the Examiner will not administer the polygraph examination. If, after the polygraph examination process has begun, either the attorney requesting the examination or the Federal Defender's office identifies a conflict of interest that would prevent the Examiner from continuing with the examination, the examination will be stopped and no examination results will be provided.
3. If, at any time during the administration of the polygraph examination, the attorney requesting the polygraph or the defendant that attorney represents decides not to proceed further with the examination, the Examiner will promptly stop the examination. In such a case, no examination results will be provided.
4. The results of a completed polygraph examination will be communicated to the attorney requesting the examination and, if requested, a written report will be prepared.
5. Both the existence and the results of any polygraph examination administered pursuant to this agreement will be held in confidence by the Examiner and the Federal Defender's office unless and until the attorney requesting the examination and the defendant he/she represents request, in writing, that this information be released. The Examiner and the Federal Defender's office would also comply with any court order to release this information. The Examiner would then be available for interviews or testimony concerning the polygraph examination results as needed. The Examiner and the Federal Defender's office will keep the results of

the completed polygraph examination on file at the Federal Defender's office for a reasonable period of time in the event those results are needed in the future.

6. The Examiner and the Federal Defender's office agree to administer a polygraph examination only to a criminal defendant charged in federal court who has been provided court-appointed counsel. This agreement does not allow the Examiner to administer a polygraph examination to any witness or other person related to a federal criminal case without a prior, express, and separate written agreement.

I understand the above-listed terms and agree to abide by them.

Defendant

Date

Attorney for Defendant

Date

Examiner

Date

Federal Defender

Date

DRAFT

United States Attorneys Manual

Title 1	Organizations and Functions
Title 2	Appeals
Title 3	EOUSA
Title 4	Civil
Title 5	ENRD
Title 6	Tax
Title 7	AntiTrust
Title 8	Civil Rights
Title 9	Criminal

(Section directly addressing polygraph examinations is contained in Title 9, Criminal 9-13.300, under the general section "Obtaining Evidence.")

9-13.000

OBTAINING EVIDENCE

9-13.300 Polygraphs -- Department Policy

The Department opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations that may have been conducted during the investigatory stage for the following reasons.

Though certain physiological reactions such as a fast heart beat, muscle contraction, and sweaty palms are believed to be associated with deception attempts, they do not, by themselves, indicate deceit. Anger, fear, anxiety, surprise, shame, embarrassment, and resentment can also produce these same physiological reactions. S. Rep. No. 284, 100th Cong., 2d Sess. 3-5 (1988). Moreover, an individual is less likely to produce these physiological reactions if he is assured that the results of the examination will not be disclosed without his approval. Given the present theoretical and practical deficiencies of

polygraphs, the government takes the position that polygraph results should not be introduced into evidence at trial. On the other hand, in respect to its use as an investigatory tool, the Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by using the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies. *E.g.*, R. Ferguson, Polygraph Policy Model for Law Enforcement, *FBI Law Enforcement Bulletin*, pages 6-20 (June 1987). The case agent or prosecutor should make clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. If the subject is in custody, the test should be preceded by Miranda warnings. Subsequent admissions or confessions will then be admissible if the trial court determines that the statements were voluntary. *Wyrick v. Fields*, 459 U.S. 42 (1982); *Keiper v. Cupp*, 509 F.2d 238 (9th Cir. 1975).

See the Criminal Resource Manual at 259 et seq. for a discussion of case law on polygraph examinations.

(The following is the section in the Criminal Resource Manual referred to above.)

Criminal Resource Manual

259 Polygraphs -- In General

1. A polygraph or lie detector examination is a procedure used to determine whether a subject shows the physiological and psychological reactions that are believed to accompany intentional attempts to deceive. Congress has defined both terms in the Employee Polygraph Protection Act of 1988, Pub. L. 100-347, Sec. 1, 29 U.S.C. §§ 2001 et seq. Section 2001(3) defines "lie detector" as including

a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

According to Section 2001(4), "the term 'polygraph' means an instrument that--

1. records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and
2. is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

Despite the appeal of a mechanical technique to measure a person's veracity, the polygraph has

met with limited judicial acceptance and use as a federal investigative tool. In light of present scientific evidence the Department of Justice continues to agree with the conclusion of the Committee on Governmental Operations of the House of Representatives, which held after extensive hearings in 1965:

There is no "lie detector." The polygraph machine is not a "lie detector," nor does the operator who interprets the graphs detect "lies." The machine records physical responses which may or may not be connected with an emotional reaction--and that reaction may or may not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.

H.R.Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). Following further hearings and study, the same conclusions were reached in 1976. *The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings on H.R. 795 Before the House Comm. on Government Operations*, 94 Cong., 2d Sess. (1976). And in 1988, as a result of continuing doubts about the usefulness and accuracy of polygraphs as a means of detecting deceit, Congress restricted the use of polygraphs in employment decisions. 29 U.S.C. §§ 2001 et seq. Despite Congress's antipathy toward the polygraph, the Department supports the limited use of polygraphs for investigatory purposes.

October 1997

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Westlaw.

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523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413, 48 Fed. R. Evid. Serv. 899, 98 Cal. Daily Op. Serv. 2329, 98 CJ

C.A.R. 1548, 11 Fla. L. Weekly Fed. S 421

(Cite as: 523 U.S. 303, 118 S.Ct. 1261)



Briefs and Other Related Documents

U.S. v. Scheffer U.S., 1998.

Supreme Court of the United States

UNITED STATES, Petitioner,

v.

Edward G. SCHEFFER.

No. 96-1133.

Argued Nov. 3, 1997.

Decided March 31, 1998.

Accused was convicted by general court-martial, H. Martin Jayne, J., of uttering bad checks, wrongfully using methamphetamine, failing to go to his appointed place of duty, and absenting himself from his unit without authority. The United States Air Force Court of Criminal Appeals, 41 M.J. 683, affirmed as modified. Review was granted. The United States Court of Appeals for the Armed Forces, Gierke, J., 44 M.J. 442, reversed. On certiorari, the United States Supreme Court, Justice Thomas, held that per se rule against admission of polygraph evidence in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense.

Judgment of Court of Appeals reversed.

Justice Kennedy concurred in part and concurred in judgment, and filed opinion in which Justice O'Connor, Justice Ginsburg, and Justice Breyer joined.

Justice Stevens dissented and filed opinion.

West Headnotes

[1] Criminal Law 110 338(1)

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k338 Relevancy in General

110k338(1) k. In General. Most Cited

Cases

Defendant's right to present relevant evidence is not unlimited, but is subject to reasonable restrictions.

[2] Criminal Law 110 338(1)

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k338 Relevancy in General

110k338(1) k. In General. Most Cited

Cases

Defendant's interest in presenting relevant evidence may bow to accommodate other legitimate interests in the criminal trial process.

[3] Criminal Law 110 661

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k661 k. Necessity and Scope of Proof.

Most Cited Cases

State and federal rulemakers have broad latitude under Constitution to establish rules excluding evidence from criminal trials.

[4] Criminal Law 110 661

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k661 k. Necessity and Scope of Proof.

Most Cited Cases

Rules established by state and federal rulemakers excluding evidence from criminal trials do not abridge defendant's right to present a defense as long as they are not arbitrary or disproportionate to the purposes they are designed to serve.

[5] Criminal Law 110 661

110 Criminal Law

110XX Trial

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523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413, 48 Fed. R. Evid. Serv. 899, 98 Cal. Daily Op. Serv. 2329, 98 CJ C.A.R. 1548, 11 Fla. L. Weekly Fed. S 421
(Cite as: 523 U.S. 303, 118 S.Ct. 1261)

110XX(C) Reception of Evidence

110k661 k. Necessity and Scope of Proof.

Most Cited Cases

Supreme Court has found the exclusion of evidence at criminal trial to be unconstitutionally arbitrary or disproportionate only where it has infringed upon weighty interest of defendant.

[6] Military Justice 258A ↪1023

258A Military Justice

258AV Evidence and Witnesses

258Ak1023 k. Admissibility and Effect in General. Most Cited Cases
(Formerly 34k47(5))

Per se rule against admission of polygraph evidence in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense to charge that, during a time when he was working undercover as an informant on drug investigations for the Office of Special Investigations (OSI), he had knowingly used methamphetamine; per se rule served several legitimate interests, such as ensuring that only reliable evidence was introduced at trial, and was neither arbitrary nor disproportionate in promoting those interests. U.S.C.A. Const. Amends. 5, 6; Military Rules of Evid., Rule 707; R.C.M. 101.

[7] Criminal Law 110 ↪661

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k661 k. Necessity and Scope of Proof.

Most Cited Cases

State and federal governments have legitimate interest, of kind sufficient to support evidentiary rule upon constitutional challenge, in ensuring that only reliable evidence is presented to trier of fact at criminal trial.

[8] Criminal Law 110 ↪731

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k731 k. Functions as Judges of Law and

Facts in General. Most Cited Cases

Criminal Law 110 ↪741(1)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k733 Questions of Law or of Fact

110k741 Weight and Sufficiency of

Evidence in General

110k741(1) k. In General. Most Cited

Cases

Criminal Law 110 ↪742(1)

110 Criminal Law

110XX Trial

110XX(F) Province of Court and Jury in General

110k733 Questions of Law or of Fact

110k742 Credibility of Witnesses

110k742(1) k. In General. Most Cited

Cases

Fundamental premise of criminal trial system is that the jury is the lie detector, and that determination as to weight and credibility of witness testimony belongs to jury.

**1262 *303 Syllabus^{FN*}

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

A polygraph examination of respondent airman indicated, in the opinion of the Air Force examiner administering the test, that there was "no deception" in respondent's denial that he had used drugs since enlisting. Urinalysis, however, revealed the presence of methamphetamine, and respondent was tried by general court-martial for using that drug and for other offenses. In denying his motion to introduce the polygraph evidence to support his testimony that he did not knowingly use drugs, the military judge relied on Military Rule of Evidence 707, which makes polygraph

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523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413, 48 Fed. R. Evid. Serv. 899, 98 Cal. Daily Op. Serv. 2329, 98 CJ C.A.R. 1548, 11 Fla. L. Weekly Fed. S 421
(Cite as: 523 U.S. 303, 118 S.Ct. 1261)

evidence inadmissible in court-martial proceedings. Respondent was convicted on all counts, and the Air Force Court of Criminal Appeals affirmed. The Court of Appeals for the Armed Forces reversed, holding that a *per se* exclusion of polygraph evidence offered by an accused to support his credibility violates his Sixth Amendment right to present a defense.

Held: The judgment is reversed.

44 M.J. 442, reversed.

Justice THOMAS delivered the opinion of the Court with respect to Parts I, II-A, and II-D, concluding that Military Rule of Evidence 707 does not unconstitutionally abridge the right of accused members of the military to present a defense. Pp. 1264-1266, 1267-1269.

(a) A defendant's right to present relevant evidence is subject to reasonable restrictions to accommodate other legitimate interests in the criminal trial process. See, e.g., Rock v. Arkansas, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37. State and federal rulemakers therefore have broad latitude under the Constitution to establish rules excluding evidence. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." E.g., *id.* at 56, 107 S.Ct. at 2711-12. This Court has found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See, e.g., *id.* at 58, 107 S.Ct. at 2712-13. Rule 707 serves the legitimate interest of ensuring that only reliable evidence is introduced. There is simply no consensus that polygraph evidence is reliable: The scientific community and the state and federal courts are extremely polarized on the matter. Pp. 1264-1266.

*304 b) Rule 707 does not implicate a sufficiently weighty interest of the accused to raise a constitutional concern under this Court's precedents. The three cases principally relied upon by the Court of Appeals, Rock, supra, at 57, 107 S.Ct., at 2712, Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019,

and Chambers v. Mississippi, 410 U.S. 284, 302-303, 93 S.Ct. 1038, 1049-1050, 35 L.Ed.2d 297, do not support a right to introduce polygraph evidence, even in very narrow circumstances. The exclusions of evidence there declared unconstitutional significantly undermined fundamental elements of the accused's defense. Such is not the case here, where the court members heard all the relevant details of the charged offense from respondent's perspective, and Rule 707 did not preclude him from introducing any factual evidence, but merely barred him from introducing expert opinion testimony to bolster his own credibility. Moreover, in contrast to the rule at issue in Rock, supra, at 52, 107 S.Ct., at 2709-2710, Rule 707 did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts at trial. Pp. 1267-1269.

THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, and II-D, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts II-B and II-C, in which REHNQUIST, C.J., and SCALIA and SOUTER, JJ., joined. **1263 KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR, GINSBURG, and BREYER, JJ., joined, *post*, p. 1269. STEVENS, J., filed a dissenting opinion, *post*, p. 1270.

Michael R. Dreeben, Washington, DC, for petitioner. Kim L. Sheffield, Washington, DC, for respondent. For U.S. Supreme Court briefs, see: 1997 WL 367053 (Pet.Brief) 1997 WL 436252 (Resp.Brief) 1997 WL 539779 (Reply.Brief) 1997 WL 631805 (Resp.Supp.Brief)

*305 Justice THOMAS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, and II-D, and an opinion with respect to Parts II-B and II-C, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice SOUTER join. This case presents the question whether Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings,

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unconstitutionally abridges the right of accused members of the military to present a defense. We hold that it does not.

I

In March 1992, respondent Edward Scheffer, an airman stationed at March Air Force Base in California, volunteered to work as an informant on drug investigations for the Air Force Office of Special Investigations (OSI). His OSI supervisors advised him that, from time to time during the course of his undercover work, they would ask him to submit to drug testing and polygraph examinations. In early April, *306 one of the OSI agents supervising respondent requested that he submit to a urine test. Shortly after providing the urine sample, but before the results of the test were known, respondent agreed to take a polygraph test administered by an OSI examiner. In the opinion of the examiner, the test "indicated no deception" when respondent denied using drugs since joining the Air Force.^{FN1}

^{FN1}. The OSI examiner asked three relevant questions: (1) "Since you've been in the [Air Force], have you used any illegal drugs?"; (2) "Have you lied about any of the drug information you've given OSI?"; and (3) "Besides your parents, have you told anyone you're assisting OSI?" Respondent answered "no" to each question. App. 12.

On April 30, respondent unaccountably failed to appear for work and could not be found on the base. He was absent without leave until May 13, when an Iowa state patrolman arrested him following a routine traffic stop and held him for return to the base. OSI agents later learned that respondent's urinalysis revealed the presence of methamphetamine.

Respondent was tried by general court-martial on charges of using methamphetamine, failing to go to his appointed place of duty, wrongfully absenting himself from the base for 13 days, and, with respect to an

unrelated matter, uttering 17 insufficient funds checks. He testified at trial on his own behalf, relying upon an "innocent ingestion" theory and denying that he had knowingly used drugs while working for OSI. On cross-examination, the prosecution attempted to impeach respondent with inconsistencies between his trial testimony and earlier statements he had made to OSI.

Respondent sought to introduce the polygraph evidence in support of his testimony that he did not knowingly use drugs. The military judge denied the motion, relying on Military Rule of Evidence 707, which provides, in relevant part:

"(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, *307 failure to take, or taking of a polygraph examination, shall not be admitted into evidence."

The military judge determined that Rule 707 was constitutional because "the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific **1264 acceptability to be relevant." ^{FN2} App. 28. He further reasoned that the factfinder might give undue weight to the polygraph examiner's testimony, and that collateral arguments about such evidence could consume "an inordinate amount of time and expense." *Ibid.*

^{FN2}. Article 36 of the Uniform Code of Military Justice authorizes the President, as Commander in Chief of the Armed Forces, see U.S. Const., Art. II, § 2, to promulgate rules of evidence for military courts: "Pretrial, trial, and post-trial procedures, including modes of proof, ... may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836(a).

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Respondent was convicted on all counts and was sentenced to a bad-conduct discharge, confinement for 30 months, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The Air Force Court of Criminal Appeals affirmed in all material respects, explaining that Rule 707 "does not arbitrarily limit the accused's ability to present reliable evidence." 41 M.J. 683, 691 (1995) (en banc).

By a 3-to-2 vote, the United States Court of Appeals for the Armed Forces reversed. 44 M.J. 442 (1996). Without pointing to any particular language in the Sixth Amendment, the Court of Appeals held that "[a] *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility ... violates his Sixth Amendment right to present a defense." *Id.*, at 445.^{FN3} Judge Crawford, dissenting, *308 stressed that a defendant's right to present relevant evidence is not absolute, that relevant evidence can be excluded for valid reasons, and that Rule 707 was supported by a number of valid justifications. *Id.*, at 449-451. We granted certiorari, 520 U.S. 1227, 117 S.Ct. 1817, 137 L.Ed.2d 1026 (1997), and we now reverse.

(1988); *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045-1046, 35 L.Ed.2d 297 (1973). A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " *Rock, supra*, at 55, 107 S.Ct., at 2711 (quoting *Chambers, supra*, at 295, 93 S.Ct., at 1046); accord, *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 1746, 114 L.Ed.2d 205 (1991). As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Rock, supra*, at 56, 107 S.Ct., at 2711; accord, *Lucas, supra*, at 151, 111 S.Ct., at 1747. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See *Rock, supra*, at 58, 107 S.Ct., at 2712-2713; *Chambers, supra*, at 302, 93 S.Ct., at 1049; *Washington v. Texas*, 388 U.S. 14, 22-23, 87 S.Ct. 1920, 1924-1925, 18 L.Ed.2d 1019 (1967).

^{FN3}. In this Court, respondent cites the Sixth Amendment's Compulsory Process Clause as the specific constitutional provision supporting his claim. He also briefly contends that the "combined effect" of the Fifth and Sixth Amendments confers upon him the right to a " 'meaningful opportunity to present a complete defense,' " *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146-2147, 90 L.Ed.2d 636 (1986) (citations omitted), and that this right in turn encompasses a constitutional right to present polygraph evidence to bolster his credibility.

^{FN4}. The words "defendant" and "jury" are used throughout in reference to general principles of law and in discussing nonmilitary precedents. In reference to this case or to the military specifically, the terms "court," "court members," or "court-martial" are used throughout, as is the military term "accused," rather than the civilian term "defendant."

II

[1][2][3][4][5] A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. ^{FN4} See *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 653-654, 98 L.Ed.2d 798

[6] *309 Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the court members, role in determining credibility, and avoiding litigation that is collateral to **1265 the primary purpose of the trial.^{FN5} The Rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.

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FN5. These interests, among others, were recognized by the drafters of Rule 707, who justified the Rule on the following grounds: the risk that court members would be misled by polygraph evidence; the risk that the traditional responsibility of court members to ascertain the facts and adjudge guilt or innocence would be usurped; the danger that confusion of the issues " 'could result in the court-martial degenerating into a trial of the polygraph machine;' " the likely waste of time on collateral issues; and the fact that the " 'reliability of polygraph evidence has not been sufficiently established.' " See 41 M.J. 683, 686 (A.F. Ct.Crim.App.1995) (citing Manual for Courts-Martial, United States Analysis of the Military Rules of Evidence, App.22, A22-46 (1994 ed.)).

A

[7] State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules. See, e.g., Fed. Rules Evid. 702, 802, 901; see also Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 2794-2795, 125 L.Ed.2d 469 (1993).

The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. 1 D. Faigman, D. Kaye, M. Saks, & J. Sanders, *Modern Scientific Evidence* 565, n. †, § 4-2.0, to § 14-7.0 (1997); see also 1 P. Giannelli & E. Imwinkelried, *Scientific Evidence* § 8-2(C), pp. 225-227 (2d ed.1993) (hereinafter Giannelli & Imwinkelried); 1 J. Strong, *McCormick on Evidence* § 206, p. 909 (4th ed.1992) (hereinafter McCormick). Some studies have concluded that polygraph tests overall are accurate and reliable. See, e.g., S. Abrams, *The Complete Polygraph Handbook* 190-191 (1989) (reporting the

overall accuracy rate from laboratory studies involving the common "control question technique" polygraph to be "in the range of 87 percent"). Others have found that polygraph tests assess truthfulness significantly less accurately—that scientific field studies suggest the accuracy rate of the "control question technique" polygraph is "little better than could be obtained by the toss of a coin," that is, 50 percent. See Iacono & Lykken, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, in 1 *Modern Scientific Evidence*, *supra*, § 14-5.3, at 629 (hereinafter Iacono & Lykken).^{FN6}

FN6. The United States notes that in 1983 Congress' Office of Technology Assessment evaluated all available studies on the reliability of polygraphs and concluded that "[o]verall, the cumulative research evidence suggests that when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant." Brief for United States 21 (quoting U.S. Congress, Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum 5* (OTA-TM-H-15, Nov. 1983)). Respondent, however, contends current research shows polygraph testing is reliable more than 90 percent of the time. Brief for Respondent 22, and n. 19 (citing J. Matte, *Forensic Psychophysiology Using the Polygraph* 121-129 (1996)). Even if the basic debate about the reliability of polygraph technology itself were resolved, however, there would still be controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus "fool" the polygraph machine and the examiner. See, e.g., Iacono & Lykken § 14-3.0.

This lack of scientific consensus is reflected in the

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disagreement among state and federal courts concerning both the *311 admissibility and the reliability of polygraph evidence.^{FN7} Although some Federal **1266 Courts of Appeals have abandoned the *per se* rule excluding polygraph evidence, leaving its admission or exclusion to the discretion of district courts under *Daubert*, see, e.g., *United States v. Posado*, 57 F.3d 428, 434 (C.A.5 1995); *United States v. Cordoba*, 104 F.3d 225, 228 (C.A.9 1997), at least one Federal Circuit has recently reaffirmed its *per se* ban, see *United States v. Sanchez*, 118 F.3d 192, 197 (C.A.4 1997), and another recently noted that it has "not decided whether polygraphy has reached a sufficient state of reliability to be admissible." *United States v. Messina*, 131 F.3d 36, 42 (C.A.2 1997). Most States maintain *per se* rules excluding polygraph evidence. See, e.g., *State v. Porter*, 241 Conn. 57, 92-95, 698 A.2d 739, 758-759 (1997); *People v. Gard*, 158 Ill.2d 191, 202-204, 198 Ill.Dec. 415, 421, 632 N.E.2d 1026, 1032 (1994); *In re Odell*, 672 A.2d 457, 459 (R.I.1996) (*per curiam*); *Perkins v. State*, 902 S.W.2d 88, 94-95 (Ct.App.Tex.1995). New Mexico is unique in making polygraph evidence generally admissible without the prior stipulation of the parties and without significant restriction. See N.M. *312 Rule Evid. § 11-707.^{FN8} Whatever their approach, state and federal courts continue to express doubt about whether such evidence is reliable. See, e.g., *United States v. Messina*, *supra*, at 42; *United States v. Posado*, *supra*, at 434; *State v. Porter*, *supra*, at 126-127, 698 A.2d, at 774; *Perkins v. State*, *supra*, at 94; *People v. Gard*, *supra*, at 202-204, 198 Ill.Dec. 415, 632 N.E.2d, at 1032; *In re Odell*, *supra*, at 459.

FN7. Until quite recently, federal and state courts were uniform in categorically ruling polygraph evidence inadmissible under the test set forth in *Frye v. United States*, 293 F. 1013 (App.D.C.1923), which held that scientific evidence must gain the general acceptance of the relevant expert community to be admissible. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), we held that *Frye* had been superseded by the Federal

Rules of Evidence and that expert testimony could be admitted if the district court deemed it both relevant and reliable.

Prior to *Daubert*, neither federal nor state courts found any Sixth Amendment obstacle to the categorical rule. See, e.g., *Bashor v. Risley*, 730 F.2d 1228, 1238(CA9), cert. denied, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984); *People v. Price*, 1 Cal.4th 324, 419-420, 3 Cal.Rptr.2d 106, 159, 821 P.2d 610, 663 (1991), cert. denied, 506 U.S. 851, 113 S.Ct. 152, 121 L.Ed.2d 102 (1992).

Nothing in *Daubert* foreclosed, as a constitutional matter, *per se* exclusionary rules for certain types of expert or scientific evidence. It would be an odd inversion of our hierarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution.

FN8. Respondent argues that because the Government-and in particular the Department of Defense-routinely uses polygraph testing, the Government must consider polygraphs reliable. Governmental use of polygraph tests, however, is primarily in the field of personnel screening, and to a lesser extent as a tool in criminal and intelligence investigations, but not as evidence at trials. See Brief for United States 34, n. 17; Barland, *The Polygraph Test in the USA and Elsewhere*, in *The Polygraph Test* 76 (A. Gale ed.1988). Such limited, out of court uses of polygraph techniques obviously differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in a criminal trial. They do not establish the reliability of polygraphs as trial evidence, and they do not invalidate reliability as a valid concern supporting Rule 707's categorical ban.

The approach taken by the President in adopting Rule 707-excluding polygraph evidence in all military trials-is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence.

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Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a *per se* rule excluding all polygraph evidence.

B

[8] It is equally clear that Rule 707 serves a second legitimate governmental interest: Preserving the court members' core *313 function of making credibility determinations in criminal trials. A fundamental premise of our criminal trial system is that "the jury is the lie detector." United States v. Barnard, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." **1267 Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891).

By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations. The common form of polygraph test measures a variety of physiological responses to a set of questions asked by the examiner, who then interprets these physiological correlates of anxiety and offers an opinion to the jury about whether the witness—often, as in this case, the accused—was deceptive in answering questions about the very matters at issue in the trial. See 1 McCormick § 206.^{FN9} Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in

addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive *314 weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. Those jurisdictions may also take into account the fact that a judge cannot determine, when ruling on a motion to admit polygraph evidence, whether a particular polygraph expert is likely to influence the jury unduly. For these reasons, the President is within his constitutional prerogative to promulgate a *per se* rule that simply excludes all such evidence.

FN9. The examiner interprets various physiological responses of the examinee, including blood pressure, perspiration, and respiration, while asking a series of questions, commonly in three categories: direct accusatory questions concerning the matter under investigation, irrelevant or neutral questions, and more general "control" questions concerning wrongdoing by the subject in general. The examiner forms an opinion of the subject's truthfulness by comparing the physiological reactions to each set of questions. See generally Giannelli & Imwinkelried 219-222; Honts & Quick, The Polygraph in 1995: Progress in Science and the Law, 71 N.D.L.Rev. 987, 990-992 (1995).

C

A third legitimate interest served by Rule 707 is avoiding litigation over issues other than the guilt or innocence of the accused. Such collateral litigation prolongs criminal trials and threatens to distract the jury from its central function of determining guilt or innocence. Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as

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whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case.^{FN10} It thus offends no constitutional principle for the President to conclude that a *per se* rule excluding all polygraph evidence is appropriate. Because litigation over the admissibility of polygraph evidence is by its very nature collateral,*315 a *per se* rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it.^{FN11}

^{FN10}. Although some of this litigation could take place outside the presence of the jury, at the very least a foundation must be laid for the jury to assess the qualifications and skill of the polygrapher and the validity of the exam, and significant cross-examination could occur on these issues.

^{FN11}. Although the Court of Appeals stated that it had “merely remove [d] the obstacle of the *per se* rule against admissibility” of polygraph evidence in cases where the accused wishes to proffer an exculpatory polygraph to rebut an attack on his credibility, 44 M.J. 442, 446 (1996), and respondent thus implicitly argues that the Constitution would require collateral litigation only in such cases, we cannot see a principled justification whereby a right derived from the Constitution could be so narrowly contained.

D

The three of our precedents upon which the Court of Appeals principally relied, Rock v. Arkansas, Washington v. Texas, and Chambers v. Mississippi, do not support a right to introduce polygraph evidence, even in very narrow circumstances. The exclusions of evidence that we declared unconstitutional in those cases significantly **1268 undermined fundamental

elements of the defendant's defense. Such is not the case here.

In Rock, the defendant, accused of a killing to which she was the only eyewitness, was allegedly able to remember the facts of the killing only after having her memory hypnotically refreshed. See Rock v. Arkansas, 483 U.S., at 46, 107 S.Ct., at 2706. Because Arkansas excluded all hypnotically refreshed testimony, the defendant was unable to testify about certain relevant facts, including whether the killing had been accidental. See id., at 47-49, 107 S.Ct., at 2706-2708. In holding that the exclusion of this evidence violated the defendant's “right to present a defense,” we noted that the rule deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts. See id., at 57, 107 S.Ct., at 2712. Moreover, the rule infringed upon the defendant's interest in testifying in her own defense—an interest that we deemed particularly significant, as it is the defendant who is the target of any criminal*316 prosecution. See id., at 52, 107 S.Ct., at 2709-2710. For this reason, we stated that a defendant ought to be allowed “to present his own version of events in his own words.” Ibid.

In Washington, the statutes involved prevented codefendants or coparticipants in a crime from testifying for one another and thus precluded the defendant from introducing his accomplice's testimony that the accomplice had in fact committed the crime. See Washington v. Texas, 388 U.S., at 16-17, 87 S.Ct., at 1921-1922. In reversing Washington's conviction, we held that the Sixth Amendment was violated because “the State arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed.” Id., at 23, 87 S.Ct., at 1925.^{FN12}

^{FN12}. In addition, we noted that the State of Texas could advance no legitimate interests in support of the evidentiary rules at issue, and those rules burdened only the defense and not the prosecution. See 388 U.S., at 22-23, 87 S.Ct., at 1924-1925. Rule 707 suffers from

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neither of these defects.

In *Chambers*, we found a due process violation in the combined application of Mississippi's common-law "voucher rule," which prevented a party from impeaching his own witness, and its hearsay rule that excluded the testimony of three persons to whom that witness had confessed. See *Chambers v. Mississippi*, 410 U.S., at 302, 93 S.Ct., at 1049. *Chambers* specifically confined its holding to the "facts and circumstances" presented in that case; we thus stressed that the ruling did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*, at 302-303, 93 S.Ct., at 1049. *Chambers* therefore does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence.

Rock, *Washington*, and *Chambers* do not require that Rule 707 be invalidated, because, unlike the evidentiary rules at issue in those cases, Rule 707 does not implicate any significant³¹⁷ interest of the accused. Here, the court members heard all the relevant details of the charged offense from the perspective of the accused, and the Rule did not preclude him from introducing any factual evidence.^{FN13} Rather, respondent was barred³¹⁷ merely from introducing expert opinion testimony to bolster his own credibility. Moreover, in contrast to the rule at issue in *Rock*, Rule 707 did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts to the court-martial members. We therefore cannot conclude that respondent's defense was significantly impaired by the exclusion of polygraph evidence. Rule 707 is thus constitutional under our precedents.

^{FN13} The dissent suggests, *post*, at 1275, that polygraph results constitute "factual evidence." The raw results of a polygraph exam—the subject's pulse, respiration, and perspiration rates—may be factual data, but these are not introduced at trial, and even if

they were, they would not be "facts" about the alleged crime at hand. Rather, the evidence introduced is the expert opinion testimony of the polygrapher about whether the subject was truthful or deceptive in answering questions about the alleged crime. A *per se* rule excluding polygraph results therefore does not prevent an accused—just as it did not prevent respondent here—from introducing factual evidence or testimony about the crime itself, such as alibi witness testimony, see *ibid.* For the same reasons, an expert polygrapher's interpretation of polygraph results is not evidence of "the accused's whole conduct," see *post*, at 1278, to which Dean Wigmore referred. It is not evidence of the "accused's ... conduct" at all, much less "conduct" concerning the actual crime at issue. It is merely the opinion of a witness with no knowledge about any of the facts surrounding the alleged crime, concerning whether the defendant spoke truthfully or deceptively on another occasion.

* * *

For the foregoing reasons, Military Rule of Evidence 707 does not unconstitutionally abridge the right to present a defense. The judgment of the Court of Appeals is reversed.

It is so ordered.

*³¹⁸ Justice KENNEDY, with whom Justice O'CONNOR, Justice GINSBURG, and Justice BREYER join, concurring in part and concurring in the judgment.

I join Parts I, II-A, and II-D of the opinion of the Court.

In my view it should have been sufficient to decide this case to observe, as the principal opinion does, that various courts and jurisdictions "may reasonably reach differing conclusions as to whether polygraph evidence should be admitted." *Ante*, at 1266. The continuing, good-faith disagreement among experts and courts on the subject of polygraph reliability counsels against our invalidating a *per se* exclusion of polygraph results or

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of the fact an accused has taken or refused to take a polygraph examination. If we were to accept respondent's position, of course, our holding would bind state courts, as well as military and federal courts. Given the ongoing debate about polygraphs, I agree the rule of exclusion is not so arbitrary or disproportionate that it is unconstitutional.

I doubt, though, that the rule of *per se* exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. Though the considerable discretion given to the trial court in admitting or excluding scientific evidence is not a constitutional mandate, see Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 587, 113 S.Ct. 2786, 2793-2794, 125 L.Ed.2d 469 (1993), there is some tension between that rule and our holding today. And, as Justice STEVENS points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.

With all respect, moreover, it seems the principal opinion overreaches when it rests its holding on the additional ground that the jury's role in making credibility determinations is diminished when it hears polygraph evidence. I am in substantial agreement with Justice STEVENS' observation that the argument demeans and mistakes the role and *319 competence of jurors in deciding the factual question of guilt or innocence. *Post*, at 1278. In the last analysis the principal opinion says it is unwise to allow the jury to hear "a conclusion about the ultimate issue in the trial." *Ante*, at 1267. I had thought this tired argument had long since been given its deserved repose as a categorical rule of exclusion. Rule 704(a) of the Federal Rules of Evidence states: "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Advisory Committee's Notes state:

"The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against

opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric.' 7 Wigmore § 1920, p. 17." Advisory Committee's Notes on Fed. Rule Evid. 704, 28 U.S.C., p. 888.

The principal opinion is made less convincing by its contradicting the rationale of Rule 704 and the well considered reasons the Advisory Committee recited in support of its adoption.

**1270 The attempt to revive this outmoded theory is especially inapt in the context of the military justice system; for the one narrow exception to the abolition of the ultimate issue rule still surviving in the Federal Rules of Evidence has been omitted from the corresponding rule adopted for the military. The ultimate issue exception in the Federal Rules of Evidence is as follows:

"No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may *320 state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Fed. Rule Evid. 704(b).

The drafting committee for the Military Rules of Evidence renounced even this remnant. It said: "The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts." Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence, App. 22, p. A22-48 (1995 ed.). Any supposed need to protect the role of the finder of fact is diminished even further by this specific acknowledgment that members of military courts are not likely to give excessive weight to opinions of experts or otherwise to be misled or confused by their

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testimony. Neither in the federal system nor in the military courts, then, is it convincing to say that polygraph test results should be excluded because of some lingering concern about usurping the jury's responsibility to decide ultimate issues.

Justice STEVENS, dissenting.

The United States Court of Military Appeals held that the President violated the Constitution in June 1991, when he promulgated Rule 707 of the Military Rules of Evidence. Had I been a member of that court, I would not have decided that question without first requiring the parties to brief and argue the antecedent question whether Rule 707 violates Article 36(a) of the Uniform Code of Military Justice, 10 U.S.C. § 836(a). As presently advised, I am persuaded that the Rule does violate the statute and should be held invalid for that reason. I also agree with the Court of Appeals that the Rule is unconstitutional. This Court's contrary holding rests on a serious undervaluation of the importance of the citizen's constitutional right to present a defense*321 to a criminal charge and an unrealistic appraisal of the importance of the governmental interests that undergird the Rule. Before discussing the constitutional issue, I shall comment briefly on the statutory question.

I

Rule 707 is a blanket rule of exclusion.^{FN1} No matter how reliable and how probative the results of a polygraph test may be, Rule 707 categorically denies the defendant any opportunity to persuade the court that the evidence should be received for any purpose. Indeed, even if the parties stipulate in advance that the results of a lie detector test may be admitted, the Rule requires exclusion.

FN1. Rule 707 states, in relevant part:

"Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not

be admitted into evidence." Mil. Rule Evid. 707(a).

The principal charge against the respondent in this case was that he had knowingly used methamphetamine. His principal defense was "innocent ingestion"; even if the urinalysis test conducted on April 7, 1992, correctly indicated that he did ingest the substance, he claims to have been unaware of that fact. The results of the lie detector test conducted three days later, if accurate, constitute factual evidence that his physical condition at that time was consistent with the theory of his defense and inconsistent with the theory of the prosecution. The results were also relevant because they tended to confirm the credibility of his testimony. Under Rule 707, even if the results of the polygraph test were more reliable than the results of the urinalysis, the weaker evidence **1271 is admissible and the stronger evidence is inadmissible.

Under the now discredited reasoning in a case decided 75 years ago, *322 Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923), that anomalous result would also have been reached in nonmilitary cases tried in the federal courts. In recent years, however, we have not only repudiated Frye's general approach to scientific evidence, but the federal courts have also been engaged in the process of rejecting the once-popular view that all lie detector evidence should be categorically inadmissible.^{FN2} Well reasoned opinions are concluding, consistently with this Court's decisions in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and General Electric Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), that the federal rules wisely allow district judges to exercise broad discretion when evaluating the admissibility of scientific evidence.^{FN3} Those opinions correctly observe that the rules of evidence generally recognized in the trial of civil and criminal cases in the federal courts do not contain any blanket prohibition against the admissibility of polygraph evidence.

FN2. "There is no question that in recent years polygraph testing has gained increasingly

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widespread acceptance as a useful and reliable scientific tool. Because of the advances that have been achieved in the field which have led to the greater use of polygraph examination, coupled with a lack of evidence that juries are unduly swayed by polygraph evidence, we agree with those courts which have found that a per se rule disallowing polygraph evidence is no longer warranted Thus, we believe the best approach in this area is one which balances the need to admit all relevant and reliable evidence against the danger that the admission of the evidence for a given purpose will be unfairly prejudicial." United States v. Piccinonna, 885 F.2d 1529, 1535 (C.A.11 1989). "[W]e do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court." United States v. Posado, 57 F.3d 428, 434 (C.A.5 1995).

FN3. "The per se ... rule excluding unstipulated polygraph evidence is inconsistent with the 'flexible inquiry' assigned to the trial judge by Daubert. This is particularly evident because Frye, which was overruled by Daubert, involved the admissibility of polygraph evidence." United States v. Cordoba, 104 F.3d 225, 227 (C.A.9 1997).

*323 In accord with the modern trend of decisions on this admissibility issue, in 1987 the Court of Military Appeals held that an accused was "entitled to attempt to lay" the foundation for admission of favorable polygraph evidence. United States v. Gipson, 24 M.J. 246, 253 (1987). The President responded to Gipson by adopting Rule 707. The governing statute authorized him to promulgate evidentiary rules "which shall, so far as he considers practicable, apply the

principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836(a).^{FN4} Thus, if there are military concerns that warrant a special rule for military tribunals, the statute gives him ample authority to promulgate special rules that take such concerns into account.

FN4. "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836(a).

Rule 707 has no counterpart in either the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Moreover, to the extent that the use of the lie detector plays a special role in the military establishment, military practices are more favorable to a rule of admissibility than is the less structured use of lie detectors in the civilian sector of our society. That is so because the military carefully regulates the administration of polygraph tests to ensure reliable results. The military maintains "very stringent standards for polygraph examiners"^{FN5} **1272 and has established its own Polygraph*324 Institute, which is "generally considered to be the best training facility for polygraph examiners in the United States."^{FN6} The military has administered hundreds of thousands of such tests and routinely uses their results for a wide variety of official decisions.^{FN7}

FN5. According to the Department of Defense's 1996 Report to Congress: "The Department of Defense maintains very stringent standards for polygraph examiners.

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The Department of Defense Polygraph Institute's basic polygraph program is the only program known to base its curriculum on forensic psychophysiology, and conceptual, abstract, and applied knowledge that meet the requirements of a master's degree-level of study. Candidates selected for the Department of Defense polygraph positions must meet the following minimum requirements:

- "1. Be a United States citizen.
- "2. Be at least 25 years of age.
- "3. Be a graduate of an accredited four-year college or have equivalent experience that demonstrates the ability to master graduate-level academic courses.
- "4. Have two years of experience as an investigator with a Federal or other law enforcement agency
- "5. Be of high moral character and sound emotional temperament, as confirmed by a background investigation.
- "6. Complete a Department of Defense-approved course of polygraph instruction.
- "7. Be adjudged suitable for the position after being administered a polygraph examination designed to ensure that the candidate realizes, and is sensitive to, the personal impact of such examinations.

"All federal polygraph examiners receive their basic polygraph training at the Department of Defense Polygraph Institute. After completing the basic polygraph training, DoD personnel must serve an internship consisting of a minimum of six months on-the-job-training and conduct at least 25 polygraph examinations under the supervision of a certified polygraph examiner before being certified as a Department of Defense polygraph examiner. In addition, DoD polygraph examiners are required to complete 80 hours of continuing education every two years." Department of Defense Polygraph Program, Annual Polygraph Report to Congress, Fiscal Year 1996, pp. 14-15; see

also Yankee, *The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception*, 40 *J. Forensic Sciences* 63 (1995).

FN6. Honts & Perry, *Polygraph Admissibility: Changes and Challenges*, 16 *Law and Human Behavior* 357, 359, n. 1 (1992) (hereinafter Honts & Perry).

FN7. Between 1981 and 1997, the Department of Defense conducted over 400,000 polygraph examinations to resolve issues arising in counterintelligence, security, and criminal investigations. Department of Defense Polygraph Program, *Annual Polygraph Report to Congress, Fiscal Year 1997*, p. 1; *id.*, *Fiscal Year 1996*, p. 1; *id.*, *Fiscal Year 1995*, p. 1; *id.*, *Fiscal Year 1994*, p. 1; *id.*, *Fiscal Year 1993*, App. A; *id.*, *Fiscal Year 1992*, App. A; *id.*, *Fiscal Year 1991*, App. A-1 (reporting information for 1981-1991).

*325 The stated reasons for the adoption of Rule 707 do not rely on any special military concern. They merely invoke three interests: (1) the interest in excluding unreliable evidence; (2) the interest in protecting the trier of fact from being misled by an unwarranted assumption that the polygraph evidence has "an aura of near infallibility"; and (3) the interest in avoiding collateral debates about the admissibility of particular test results.

It seems clear that those interests pose less serious concerns in the military than in the civilian context. Disputes about the qualifications of the examiners, the equipment, and the testing procedures should seldom arise with respect to the tests conducted by the military.

Moreover, there surely is no reason to assume that military personnel who perform the factfinding function are less competent than ordinary jurors to assess the reliability of particular results, or their relevance to the issues.^{FN8} Thus, there is no identifiable military concern that justifies the President's promulgation of a special military rule that is more burdensome to the accused in

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military trials than the evidentiary rules applicable to the trial of civilians.

FN8. When the members of the court-martial are officers, as was true in this case, they typically have at least a college degree as well as significant military service. See 10 U.S.C. § 825(d)(2); see also, e.g., United States v. Carter, 22 M.J. 771, 776 (A.C.M.R.1986).

It, therefore, seems fairly clear that Rule 707 does not comply with the statute. I do not rest on this ground, however, because briefing might persuade me to change my views, and because the Court has decided only the constitutional question.

II

The Court's opinion barely acknowledges that a person accused of a crime has a constitutional right to present a *326 defense. It is **1273 not necessary to point to "any particular language in the Sixth Amendment," *ante*, at 1264, to support the conclusion that the right is firmly established. It is, however, appropriate to comment on the importance of that right before discussing the three interests that the Government relies upon to justify Rule 707.

The Sixth Amendment provides that "the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor." Because this right "is an essential attribute of the adversary system itself," we have repeatedly stated that few rights "are more fundamental than that of an accused to present witnesses in his own defense." FN9 According to Joseph Story, that provision was included in the Bill of Rights in reaction to a notorious common-law rule categorically excluding defense evidence in treason and felony cases. FN10 Our holding in Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), that this right is applicable to the States, rested on the premises that it "is in plain terms the right to present a defense" and that it "is a fundamental element of due process*327 of law." FN11 Consistent with the history

of the provision, the Court in that case held that a state rule of evidence that excluded "whole categories" of testimony on the basis of a presumption of unreliability was unconstitutional. FN12

FN9. "Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, e.g., Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). Indeed, this right is an essential attribute of the adversary system itself. ... The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment ..." Taylor v. Illinois, 484 U.S. 400, 408-409, 108 S.Ct. 646, 652-653, 98 L.Ed.2d 798 (1988).

FN10. "Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." Washington v. Texas, 388 U.S. 14, 19-20, 87 S.Ct. 1920, 1923-1924, 18 L.Ed.2d 1019 (1967) (footnotes omitted).

FN11. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's

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version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Id., at 19, 87 S.Ct., at 1923.

FN12. "It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

"The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury." Id., at 22, 87 S.Ct., at 1925.

The blanket rule of inadmissibility held invalid in Washington v. Texas covered the testimony of alleged accomplices. Both before and after that decision, the Court has recognized the potential injustice produced by rules that exclude entire categories of relevant evidence that is potentially unreliable. At common law interested parties such as defendants,^{FN13} their spouses,^{FN14} and their co-^{**1274} conspirators^{FN15} were not competent ^{*328}witnesses. "Nor were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." Benson v. United States, 146 U.S. 325, 336, 13 S.Ct. 60, 63-64, 36 L.Ed. 991 (1892). And, of course, under the regime established by Frye v. United States, scientific evidence was inadmissible unless it met a stringent "general acceptance" test. Over the years, with respect to category after category, strict rules of exclusion have

been replaced by rules that broaden the discretion of trial judges to admit potentially unreliable evidence and to allow properly instructed juries to evaluate its weight. While that trend has included both rulemaking and non-constitutional judicial decisions, the direction of the trend has been consistent and it has been manifested in constitutional holdings as well.

FN13. "It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule." Benson v. United States, 146 U.S. 325, 335, 13 S.Ct. 60, 63, 36 L.Ed. 991 (1892).

FN14. "The common-law rule, accepted at an early date as controlling in this country, was that husband and wife were incompetent as witnesses for or against each other. ...

"The Court recognized that the basic reason underlying th[e] exclusion [of one spouse's testimony on behalf of the other] had been the practice of disqualifying witnesses with a personal interest in the outcome of a case. Widespread disqualifications because of interest, however, had long since been abolished both in this country and in England in accordance with the modern trend which permitted interested witnesses to testify and left it for the jury to assess their credibility. Certainly, since defendants were uniformly allowed to testify in their own behalf, there was no longer a good reason to prevent them from using their spouses as witnesses. With the original reason for barring favorable testimony of spouses gone the Court concluded that this aspect of the old rule should go too." Hawkins v. United States, 358 U.S. 74, 75-76, 79 S.Ct. 136, 138, 3 L.Ed.2d 125 (1958).

FN15. See Washington v. Texas, 388 U.S., at 20-21, 87 S.Ct., at 1923-1924.

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Commenting on the trend that had followed the decision in *Benson*, the Court in 1918 observed that in the "years which have elapsed since the decision of the *Benson Case*, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the *329 truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." *Rosen v. United States*, 245 U.S. 467, 471, 38 S.Ct. 148, 150, 62 L.Ed. 406.

See also *Funk v. United States*, 290 U.S. 371, 377-378, 54 S.Ct. 212, 213-214, 78 L.Ed. 369 (1933). It was in a case involving the disqualification of spousal testimony that Justice Stewart stated: "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81, 79 S.Ct. 136, 140, 3 L.Ed.2d 125 (1958) (concurring opinion).

State evidentiary rules may so seriously impede the discovery of truth, "as well as the doing of justice," that they preclude the "meaningful opportunity to present a complete defense" that is guaranteed by the Constitution, *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (internal quotation marks omitted).^{FN16} **1275 In *330 *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973), we concluded that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice." ^{FN17} As the Court notes today, restrictions on the "defendant's right to present relevant evidence," *ante*, at 1264, must comply with the admonition in *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S.Ct. 2704, 2712, 97 L.Ed.2d 37 (1987), that they "may not be arbitrary or disproportionate to the purposes they

are designed to serve." Applying that admonition to Arkansas' blanket rule prohibiting the admission of hypnotically refreshed testimony, we concluded that a "State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case." *Id.*, at 61, 107 S.Ct., at 2714. That statement of constitutional law is directly relevant to this case.

FN16. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, [410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombetta*, 467 U.S. [479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984)]; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S.Ct. 2052, 2062-2063, 80 L.Ed.2d 674 (1984) ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507-508, 92 L.Ed. 682 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case

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encounter and 'survive the crucible of meaningful adversarial testing.' United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984). See also Washington v. Texas, *supra*, at 22-23, 87 S.Ct., at 1924-1925." Crane v. Kentucky, 476 U.S., at 690-691, 106 S.Ct., at 2146-2147.

FN17. "Few rights are more fundamental than that of an accused to present witnesses in his own defense. *E.g.*, Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967); In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S., at 302, 93 S.Ct., at 1049.

*331 III

The constitutional requirement that a blanket exclusion of potentially unreliable evidence must be proportionate to the purposes served by the rule obviously makes it necessary to evaluate the interests on both sides of the

balance. Today the Court all but ignores the strength of the defendant's interest in having polygraph evidence admitted in certain cases. As the facts of this case illustrate, the Court is quite wrong in assuming that the impact of Rule 707 on respondent's defense was not significant because it did not preclude the introduction of any "factual evidence" or prevent him from conveying "his version of the facts to the court-martial members." *Ante*, at 1268-1269. Under such reasoning, a rule that excluded the testimony of alibi witnesses would not be significant as long as the defendant is free to testify himself. But given the defendant's strong interest in the outcome—an interest that was sufficient to make his testimony presumptively untrustworthy and therefore inadmissible at common law—his uncorroborated testimony is certain to be less persuasive than that of a third-party witness. A rule that bars him "from introducing expert opinion testimony to bolster his own credibility," *ibid.*, unquestionably impairs any "meaningful opportunity to present a complete defense"; indeed, it is sure to be outcome determinative in many cases.

Moreover, in this case the results of the polygraph test, taken just three days after the urinalysis, constitute independent factual evidence that is not otherwise available and that strongly supports his defense of "innocent ingestion." Just as flight or other evidence of "consciousness of guilt" may sometimes be relevant, on some occasions evidence of "consciousness of innocence" may also be relevant to the central issue at trial. Both the answers to the questions propounded by the examiner, and the physical**1276 manifestations produced by those utterances, were probative of an innocent state of mind shortly after he ingested the drugs. In Dean Wigmore's view, both "conduct" and "utterances" may constitute*332 factual evidence of a "consciousness of innocence." FN18 As the Second Circuit has held, when there is a serious factual dispute over the "basic defense [that defendant] was unaware of any criminal wrongdoing," evidence of his innocent state of mind is "critical to a fair adjudication of criminal charges." FN19 The exclusion of the test results in this case cannot be fairly equated with a ruling that merely prevented the defendant from encumbering the record with cumulative evidence. Because the Rule

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may well have affected the outcome of the trial, it unquestionably "infringed upon a weighty interest of the accused." *Ante*, at 1264.

***333 Reliability**

There are a host of studies that place the reliability of polygraph tests at 85% to 90%.^{FN20} While critics of the polygraph argue that accuracy is much lower, even the studies cited by the critics place polygraph accuracy at 70%.^{FN21} Moreover, to the extent that the polygraph errs, studies have repeatedly shown that the polygraph is more likely to find innocent people guilty than vice versa.^{FN22} Thus, exculpatory polygraphs-like the one in this case-are likely to be more reliable than inculpatory ones.

^{FN18} "Moreover, there are other principles by which a defendant may occasionally avail himself of conduct as evidence in his favor-in particular, of conduct indicating consciousness of innocence, ... of utterances asserting his innocence ..., and, in sedition charges, of conduct indicating a loyal state of mind..." 1A J. Wigmore, *Evidence* § 56.1, p. 1180 (Tillers rev. ed.1983); see *United States v. Reifsteck*, 841 F.2d 701, 705 (C.A.6 1988).

^{FN19} "Mariotta's basic defense was that he was unaware of any criminal wrongdoing at Wedtech, that he was an innocent victim of the machinations of the sophisticated businessmen whom he had brought into the company to handle its financial affairs. That defense was seriously in issue as to most of the charges against him, drawing considerable support from the evidence

"With the credibility of the accusations about Mariotta's knowledge of wrongdoing seriously challenged, evidence of his denial of such knowledge in response to an opportunity to obtain immunity by admitting it and implicating others became highly significant to a fair presentation of his defense

"Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, we have not hesitated to order a new trial." *United States v. Biaggi*, 909 F.2d 662, 691-692 (C.A.2 1990); see also *United States v. Bucur*, 194 F.2d 297 (C.A.7 1952); *Herman v. United States*, 48 F.2d 479 (C.A.5 1931).

The question, then, is whether the three interests on which the Government relies are powerful enough to support a categorical rule excluding the results of all polygraph tests no matter how unfair such a rule may be in particular cases.

^{FN20} Raskin, Honts, & Kircher, *The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests*, in 1 *Modern Scientific Evidence* 572 (D. Faigman, D. Kaye, M. Saks, & J. Sanders eds.1997) (hereinafter *Faigman*) (compiling eight laboratory studies that place mean accuracy at approximately 90%); *id.*, at 575 (compiling four field studies, scored by independent examiners, that place mean accuracy at 90.5%); Raskin, Honts, & Kircher, *A Response to Professors Iacono and Lykken*, in *Faigman* 627 (compiling six field studies, scored by original examiners, that place mean accuracy at 97.5%); S. Abrams, *The Complete Polygraph Handbook* 190-191 (1989) (compiling 13 laboratory studies that, excluding inconclusive results, place mean accuracy at 87%).

^{FN21} Iacono & Lykken, *The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests*, in *Faigman* 608 (compiling three studies that place mean accuracy at 70%).

^{FN22} *E.g.*, Iacono & Lykken, *The Case Against Polygraph Tests*, in *Faigman* 608-609; Raskin, Honts, & Kircher, *A Response to Professors Iacono and Lykken*, in *Faigman* 621; Honts & Perry 362; Abrams, *The*

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Complete Polygraph Handbook, at 187-188, 191.

Of course, within the broad category of lie detector evidence, there may be a wide variation in both the validity and the relevance^{FN23} of particular test results.

Questions about the examiner's integrity, independence, choice of questions, or training in the detection**1277 of deliberate attempts to provoke misleading physiological responses may justify exclusion of *334 specific evidence. But such questions are properly addressed in adversary proceedings; they fall far short of justifying a blanket exclusion of this type of expert testimony.

FN23. See, e.g., Judge Gonzalez's careful attention to the relevance inquiry in the proceedings on remand from the Court of Appeals decision in *Piccinonna*. U.S. v. Piccinonna, 729 F.Supp. 1336 (S.D.Fla.1990).

There is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible. Expert testimony about a defendant's "future dangerousness" to determine his eligibility for the death penalty, even if wrong "most of the time," is routinely admitted. Barefoot v. Estelle, 463 U.S. 880, 898-901, 103 S.Ct. 3383, 3397-3399, 77 L.Ed.2d 1090 (1983). Studies indicate that handwriting analysis, and even fingerprint identifications, may be less trustworthy than polygraph evidence in certain cases.^{FN24} And, of course, even highly dubious eyewitness testimony *335 is, and should be, admitted and tested in the crucible of cross-examination. The Court's reliance on potential unreliability as a justification for a categorical rule of inadmissibility reveals that it is "overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S., at 596, 113 S.Ct., at 2798.^{FN25}

FN24. One study compared the accuracy of fingerprinting, handwriting analysis, polygraph tests, and eyewitness identification.

The study consisted of 80 volunteers divided into 20 groups of 4. Fingerprints and handwriting samples were taken from all of the participants.

In each group of four, one person was randomly assigned the role of "perpetrator."

The perpetrator was instructed to take an envelope to a building doorkeeper (who knew that he would later need to identify the perpetrator), sign a receipt, and pick up a package. After the "crime," all participants were given a polygraph examination.

The fingerprinting expert (comparing the original fingerprints with those on the envelope), the handwriting expert (comparing the original samples with the signed receipt), and the polygrapher (analyzing the tests) sought to identify the perpetrator of each group. In addition, two days after the "crime," the doorkeeper was asked to pick the picture of the perpetrator out of a set of four pictures.

The results of the study demonstrate that polygraph evidence compares favorably with other types of evidence. Excluding "inconclusive" results from each test, the fingerprinting expert resolved 100% of the cases correctly, the polygrapher resolved 95% of the cases correctly, the handwriting expert resolved 94% of the cases correctly, and the eyewitness resolved only 64% of the cases correctly. Interestingly, when "inconclusive" results were included, the polygraph test was more accurate than any of the other methods: The polygrapher resolved 90% of the cases correctly, compared with 85% for the handwriting expert, 35% for the eyewitness, and 20% for the fingerprinting expert. Widacki & Horvath, An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification, 23 J. Forensic Sciences 596,

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596-600 (1978); see also Honts & Perry 365.

FN25. The Government argues that there is a widespread danger that people will learn to "fool" the polygraph, and that this possibility undermines any claim of reliability. For example, the Government points to the availability of a book called *Beat the Box: The Insider's Guide to Outwitting the Lie Detector*. Tr. of Oral Arg. 53; Brief for United States 25, n. 10. *Beat the Box*, however, actually cuts against a *per se* ban on polygraph evidence. As the preface to the book states:

"Dr. Kalashnikov [the author] is a polygraph professional. If you go up against him, or someone like him, he'll probably catch you at your game. That's because he knows his work and does it by the book.

"What most people don't realize is that there are a lot of not so professional polygraph examiners out there. It's very possible that you may be tested by someone who is more concerned about the number of tests he will run this week (and his Christmas bonus) than he is about the precision of each individual test.

"Remember, the adage is that you can't beat the polygraph system but you can beat the operator. This book is gleefully dedicated to the idea of a sporting chance." V. Kalashnikov, *Beat the Box: The Insider's Guide to Outwitting the Lie Detector* (1983) (preface); *id.*, at 9 ("[W]hile the system is all but unbeatable, you can surely beat the examiner").

Thus, *Beat the Box* actually supports the notion that polygraphs are reliable when conducted by a highly trained examiner-like the one in this case.

Nonetheless, some research has indicated that people can be trained to use "countermeasures" to fool the polygraph. See, e.g., Honts, Raskin, & Kircher, *Mental and Physical Countermeasures Reduce the*

Accuracy of Polygraph Tests, 79 *J. Applied Psychology* 252 (1994). This possibility, however, does not justify a *per se* ban. First, research indicates that individuals must receive specific training before they can fool the polygraph (*i.e.*, information alone is not enough). Honts, Hodes, & Raskin, *Effects of Physical Countermeasures on the Physiological Detection of Deception*, 70 *J. Applied Psychology* 177, 185 (1985); see also Honts, Raskin, Kircher, & Hodes, *Effects of Spontaneous Countermeasures on the Physiological Detection of Deception*, 16 *J. Police Science and Administration* 91, 93 (1988) (spontaneous countermeasures ineffective). Second, as countermeasures are discovered, it is fair to assume that polygraphers will develop ways to detect these countermeasures. See, e.g., Abrams & Davidson, *Counter-Countermeasures in Polygraph Testing*, 17 *Polygraph* 16, 17-19 (1988); Raskin, Honts, & Kircher, *The Case for Polygraph Tests*, in Faigman 577-578. Of course, in any trial, jurors would be instructed on the possibility of countermeasures and could give this possibility its appropriate weight.

****1278 *336 *The Role of the Jury***

It is the function of the jury to make credibility determinations. In my judgment evidence that tends to establish either a consciousness of guilt or a consciousness of innocence may be of assistance to the jury in making such determinations. That also was the opinion of Dean Wigmore:

"Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations." 2 *J. Wigmore, Evidence* § 293, p. 232 (J. Chadbourn rev. ed. 1979).

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There is, of course, some risk that some "juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise," *ante*, at 1267. In my judgment, however, it is much more likely that juries will be guided by the instructions of the trial judge concerning the credibility of expert as well as lay witnesses. The strong presumption that juries will follow the court's instructions, see, e.g., *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987), applies to exculpatory as well as inculpatory evidence. Common*337 sense suggests that the testimony of disinterested third parties that is relevant to the jury's credibility determination will assist rather than impair the jury's deliberations. As with the reliance on the potential unreliability of this type of evidence, the reliance on a fear that the average jury is not able to assess the weight of this testimony reflects a distressing lack of confidence in the intelligence of the average American.^{FN26}

^{FN26} Indeed, research indicates that jurors do not "blindly" accept polygraph evidence, but that they instead weigh polygraph evidence along with other evidence. Cavoukian & Heslegrave, *The Admissibility of Polygraph Evidence in Court: Some Empirical Findings*, 4 *Law and Human Behavior* 117, 123, 127-128, 130 (1980) (hereinafter *Cavoukian & Heslegrave*); see also *Honts & Perry* 366-367. One study found that expert testimony about the limits of the polygraph "completely eliminated the effect of the polygraph evidence" on the jury. *Cavoukian & Heslegrave* 128-129 (emphasis added).

Collateral Litigation

The potential burden of collateral proceedings to determine the examiner's qualifications is a manifestly insufficient justification for a categorical exclusion of expert testimony. Such proceedings are a routine predicate for the admission of any expert testimony, and may always give rise to searching cross-examination.

If testimony that is critical to a fair determination of guilt or innocence could be excluded for that reason, the right to a meaningful opportunity to present a defense would be an illusion.

It is incongruous for the party that selected the examiner, the equipment, the testing procedures, and the questions asked of the defendant to complain about the examinee's burden of proving that the test was properly conducted. While there may well be a need for substantial collateral proceedings when the party objecting to admissibility has a basis for questioning some aspect of the examination, it seems quite obvious that the Government is in no position to challenge *338 the competence of the procedures that it has developed and relied upon in hundreds of thousands of cases.

In all events the concern about the burden of collateral debates about the integrity of a particular examination, or the competence of **1279 a particular examiner, provides no support for a categorical rule that requires exclusion even when the test is taken pursuant to a stipulation and even when there has been a stipulation resolving all potential collateral issues. Indeed, in this very case there would have been no need for any collateral proceedings because respondent did not question the qualifications of the expert who examined him, and surely the Government is in no position to argue that one who has successfully completed its carefully developed training program^{FN27} is unqualified.

The interest in avoiding burdensome collateral proceedings might support a rule prescribing minimum standards that must be met before any test is admissible,^{FN28} but it surely does not support the blunderbuss at issue.^{FN29}

^{FN27} See n. 5, *supra*.

^{FN28} See N.M. Rule Evid. § 11-707.

^{FN29} It has been suggested that if exculpatory polygraph evidence may be adduced by the defendant, the prosecutor should also be allowed to introduce inculpatory test results. That conclusion

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would not be dictated by a holding that vindicates the defendant's Sixth Amendment right to summon witnesses. Moreover, as noted above, studies indicate that exculpatory polygraphs are more reliable than inculpatory ones. See n. 22, *supra*. In any event, a concern about possible future legal developments is surely not implicated by the narrow issue presented by the holding of the Court of Military Appeals in this case. Even if it were, I can see nothing fundamentally unfair about permitting the results of a test taken pursuant to stipulation being admitted into evidence to prove consciousness of guilt as well as consciousness of innocence.

IV

The Government's concerns would unquestionably support the exclusion of polygraph evidence in particular cases, and may well be sufficient to support a narrower rule designed to respond to specific concerns. In my judgment, however, *339 those concerns are plainly insufficient to support a categorical rule that prohibits the admission of polygraph evidence in all cases, no matter how reliable or probative the evidence may be. Accordingly, I respectfully dissent.

U.S., 1998.

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Eighth Circuit Case Law

Admissibility of Polygraph Evidence

United States v. Gianakos, 415 F.3d 912 (8th Cir. 2005)

Gianakos was found guilty after trial of kidnaping with death resulting and was sentenced to life imprisonment. At trial, Gianakos wanted to cross-examine the testifying detective about the polygraph examination results for two other individuals concerning their involvement in the murder. The district court did not allow this cross-examination.

The Eighth Circuit affirms, citing *United States v. Scheffer* in stating that litigation over polygraph results is “by its very nature collateral,” and it may diminish the jury’s role in credibility determinations. “A fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’” The Eighth Circuit also pointed out that defense counsel could cross-examine both the detective and one of the individuals who failed the polygraph (because he testified at trial) fully about any inconsistencies in their statements, and counsel could do so without the results of a polygraph examination.

United States v. Rouse, 410 F.3d 1005 (8th Cir. 2005)

Rouse was convicted of aggravated sexual abuse. In a motion for new trial, Rouse introduced evidence that the victims had recanted and now said they lied when they accused their uncles (including Rouse) of sexually abusing them. Rouse also attempted to introduce the results of a polygraph examination in support of the motion. The district court held an evidentiary hearing to determine whether the polygraph examination met the standards of reliability under *Daubert*. After listening to testimony from experts from both parties, “the court found that the test did not meet the standards of any ‘accepted polygraph testing procedure,’ that the circumstances surrounding the examination ‘further undermine its reliability,’ and therefore that ‘the polygraph evidence in this case is not reliable enough to determine the truthfulness of [the witness’s] testimony.’”

The Eighth Circuit concludes the district court did not abuse its discretion in refusing to consider the polygraph results. Even if the district court had admitted the results into evidence, it found those results unreliable. So, failure to admit

those results was at best harmless error, as those results would not have affected the district court's ultimate conclusion that the recantation was not credible.

United States v. Polmanteer, 270 F.3d 540 (8th Cir. 2001)

Polmanteer was convicted after trial of possession with intent to distribute methamphetamine. Polmanteer had been pulled over for speeding and, after several searches, officers found 6 ½ pounds of methamphetamine hidden in the car. Polmanteer had two passengers in the car with her at the time of the stop. At sentencing, the district court said it would consider a reduction for Polmanteer's role in the offense, but 'suggested' that she take a polygraph examination if she was 'serious' about getting the reduction. She agreed to do so, and sentencing was rescheduled to give her the opportunity to take the test. She failed the polygraph examination, which was conducted by the examiner of her choice.

At resentencing, the government sought a 2-level enhancement for obstruction of justice but did not offer any evidence concerning the polygraph examination. The district court imposed the 2-level enhancement, "reasoning that by trying to pass a polygraph examination Polmanteer indirectly had attempted to give false testimony in hopes of a lighter sentence." The district court did, however, grant a 2-level reduction for role in the offense based on the trial evidence.

The Eighth Circuit remanded on the issue of the obstruction of justice enhancement. The government did not introduce any evidence about the polygraph results; it did not even introduce the examiner's report. The Eighth Circuit also notes that the government initially objected to the use of a polygraph examination, as suggested by the district court, to address the issue of a role reduction. Then, "in an about face," the U.S. Attorney's office advocated use of the polygraph results for purposes of applying the obstruction of justice enhancement to increase Polmanteer's sentence. Also, under the Guidelines, not all inaccurate testimony is a result of a willful attempt to obstruct justice. Finally, the Court expresses concern that it was the district court who 'suggested' Polmanteer take a polygraph examination, putting her in "an awkward position," and remands for resentencing.

United States v. Waters, 194 F.3d 926 (8th Cir. 1999)

Waters was convicted after trial of aggravated sexual abuse. Before trial,

Waters moved to admit the results of a polygraph examination he took, pre-indictment, at the request of the government; the results showed his answers were “not indicative of deception.” Waters requested a *Daubert* hearing to establish the examination’s scientific reliability, but he did not present any evidence as to the reliability of the examination. Noting “the lack of scientific consensus on the reliability of polygraph examinations, the district court held that it would ‘simply’ exclude any evidence relating to the polygraph examination under Fed.R.Evid. 403.” The Eighth Circuit rules the district court did not abuse its discretion in denying Waters’ request for a *Daubert* hearing and excluding the evidence.

The district court also did not err in refusing to admit at trial evidence of Waters’ responses to the polygraph examination. Waters, not the government, wanted to introduce this “prior statement consistent with his plea of not guilty,” and the court properly determined that such a statement (when offered by the defendant), absent exception circumstances, is hearsay.

United States v. Dacre, 2006 WL 2129759 (8th Cir.) (unpublished)

At sentencing, Dacre tried to introduce evidence of a polygraph examination he took “to bolster his claim that he did not possess a firearm in connection with his drug offenses.” The district court refused to consider it, deciding that “absent a stipulation of the parties, it would evaluate the credibility of the witnesses without weighing expert opinion on polygraph results.” The Eighth Circuit rules the district court did not abuse its discretion.

United States v. Santoyo, 2006 WL 1389835 (8th Cir.) (unpublished)

Pretrial, the government filed a motion in limine seeking to exclude evidence that its confidential informant had shown deceptive responses on a polygraph examination concerning a defendant in another case. The district court granted the motion, “concluding that the results of the polygraph were of a collateral nature, that the evidence as to the informant’s credibility would be cumulative, and that the evidence would distract the jury.” The Eighth Circuit affirms, stating the district court did not abuse its discretion. The Eighth Circuit further notes the defendant “had the opportunity to inquire about the informant’s credibility on cross-examination.”

ETHICS

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I. CURRENT RULES

RULE 32:1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

© In no event shall a lawyer represent both parties in dissolution of marriage proceedings.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship

to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see rule 32:1.8. For former client conflicts of interest, see rule 32:1.9. For conflicts of interest involving prospective clients, see rule 32:1.18. For definitions of "informed consent" and "confirmed in writing," see rule 32:1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also comment to rule 32:5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 32:1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See rule 32:1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See rule 32:1.9. See also comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 32:1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See rule 32:1.9©.

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under rule 32:1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See rule 32:1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also rule 32:1.10 (personal interest conflicts under rule 32:1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., a parent, child, sibling, spouse, cohabiting partner, or lawyer related in any other familial or romantic capacity, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See rule 32:1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See rule 32:1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See rule 32:1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

[13a] Where a lawyer has been retained by an insurer to represent the insured pursuant to the insurer's obligations under a liability insurance policy, the lawyer may comply with reasonable cost-containment litigation guidelines proposed by the insurer if such guidelines do not materially interfere with the lawyer's duty to exercise independent professional judgment to

protect the reasonable interests of the insured, do not regulate the details of the lawyer's performance, and do not materially limit the professional discretion and control of the lawyer. The lawyer may provide the insurer with a description of the services rendered and time spent, but the lawyer may not agree to provide detailed information that would undermine the protection of confidential client-lawyer information, if the insurer will share such information with a third party. If the lawyer believes that guidelines proposed by the insurer prevent the lawyer from exercising independent professional judgment or from protecting confidential client information, the lawyer shall identify and explain the conflict of interest to the insurer and insured and also advise the insured of the right to seek independent legal counsel. If the conflict is not eliminated but the insured wants the lawyer to continue the representation, the lawyer may proceed if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation and the insured's informed consent is obtained pursuant to paragraph (b)(4).

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See rule 32:1.1 (competence) and rule 32:1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Paragraph © provides a specific example of such a nonconsentable conflict, that is, where a lawyer is asked to represent both parties in a marriage dissolution proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under rule 32:1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See rule 32:1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved. See comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See rule 32:1.0(b). See also rule 32:1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See rule 32:1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraphs (b)(3) and © prohibit representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent

informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise, and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication, or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer

should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See rule 32:1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See rule 32:1.2©.

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of rule 32:1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in rule 32:1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See rule 32:1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 32:1.8 CONFLICT OF INTEREST: CURRENT RULES: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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

© A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, sibling, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by rule 32:1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client formal practice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(I) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter

of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the client-lawyer relationship. Even in these provisionally exempt relationships, the lawyer should strictly scrutinize the lawyer's behavior for any conflicts of interest to determine if any harm may result to the client or to the representation. If there is any reasonable possibility that the legal representation of the client may be impaired, or the client harmed by the continuation of the sexual relationship, the lawyer should immediately withdraw from the legal representation.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (I) that applies to any one of them shall apply to all of them.

(l) A lawyer related to another lawyer shall not represent a client whose interests are directly adverse to a person whom the lawyer knows is represented by the related lawyer except upon the client's informed consent, confirmed in a writing signed by the client. Even if the client's interests do not appear to be directly adverse, the lawyer should not undertake the representation of a client if there is a significant risk that the related lawyer's involvement will interfere with the lawyer's loyalty and exercise of independent judgment, or will create a significant risk that client confidences will be revealed. For purposes of this paragraph, "related lawyer" includes a parent, child, sibling, spouse, cohabiting partner, or lawyer related in any other familial or romantic capacity.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of investment services to existing clients of the lawyer's legal practice. See rule 32:5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by rule 32:1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See rule 32:1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of rule 32:1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that rule 32:1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these rules. See rules 32:1.2(d), 32:1.6, 32:1.9©, 32:3.3, 32:4.1(b), 32:8.1, and 32:8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph © does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph ©.

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this rule is where the client is a relative of the donee.

[8] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 32:1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the

client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to rule 32:1.5 and paragraphs (a) and (I).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also rule 32:5.4© (prohibiting interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee

arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with rule 32:1.7. The lawyer must also conform to the requirements of rule 32:1.6 concerning confidentiality. Under rule 32:1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under rule 32:1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under rule 32:1.7(b), the informed consent must be confirmed in writing.

[12a] When the lawyer is publicly-compensated, such as in the case of a public defender in a criminal case or a guardian appointed in a civil case or when civil legal services are provided by a legal aid organization, the fee arrangement ordinarily does not pose the same risk of interference with the lawyer's independent professional judgment that exists in other contexts. Under paragraph (f), such a lawyer must disclose the fact that the lawyer is being compensated through public funding or that legal services are being provided as part of a legal aid organization; however, formal consent by the client to the fee arrangement is not required under such circumstances given the limited ability of an indigent client as a practical matter to refuse the services of the lawyer being compensated through public funding or through legal aid.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under rule 32:1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, rule 32:1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also rule 32:1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen,

particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with rule 32:1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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

Acquiring Proprietary Interest in Litigation

[16] Paragraph (I) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (I) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. Iowa law determines which liens are authorized. These may include liens granted by statute and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by rule 32:1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to

represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See rule 32:1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs, or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (l) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibitions set forth in paragraphs (j) and (l) are personal and are not applied to associated lawyers.

RULE 32:1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related

matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person, and
- (2) about whom the lawyer had acquired information protected by rules 32:1.6 and 32:1.9© that is material to the matter, unless the former client gives informed consent, confirmed in writing.

© A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See comment [9]. Current and former government lawyers must comply with this rule to the extent required by rule 32:1.11.

[2] The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the

other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to

another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by rules 32:1.6 and 32:1.9©. Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See rule 32:1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See rules 32:1.6 and 32:1.9©.

[8] Paragraph © provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See rule 32:1.0(e). With regard to the effectiveness of an advance waiver, see comment [22] to rule 32:1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see rule 32:1.10.

RULE 32:1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a

client when any one of them practicing alone would be prohibited from doing so by rule 32:1.7 or 32:1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by rules 32:1.6 and 32:1.9© that is material to the matter.

© A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 32:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 32:1.11.

Comment

Definition of "Firm"

[1] For purposes of the Iowa Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See rule 32:1.0©. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See rule 32:1.0, comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by rules 32:1.9(b) and 32:1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. In addition, written notice must be promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule. See rules 32:1.0(k) and 32:5.3.

[5] Rule 32:1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate rule 32:1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by rules 32:1.6 and 32:1.9©.

[6] Rule 32:1.10© removes imputation with the informed consent of the affected client or former client under the conditions stated in rule 32:1.7. The conditions stated in rule 32:1.7 require the lawyer to determine that the representation is not prohibited by rule 32:1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the

future, see rule 32:1.7, comment [22]. For a definition of informed consent, see rule 32:1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by rule 32:1.11(b) and ©, not this rule. Under rule 32:1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment, or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under rule 32:1.8, paragraph (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 32:1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to rule 32:1.9©; and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

© Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to rules 32:1.7 and 32:1.9; and

(2) shall not:

- (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
- (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a

lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by rule 32:1.12(b) and subject to the conditions stated in rule 32:1.12(b).

(e) As used in this rule, the term "matter" includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(f) Prosecutors for the state or county shall not engage in the defense of an accused in any criminal matter during the time they are engaged in such public responsibilities. However, this paragraph does not apply to a lawyer not regularly employed as a prosecutor for the state or county who serves as a special prosecutor for a specific criminal case, provided that the employment does not create a conflict of interest or the lawyer complies with the requirements of rule 32:1.7(b).

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Iowa Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in rule 32:1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See rule 32:1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2), and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a

former government or private client. Rule 32:1.10 is not applicable to the conflicts of interest addressed by this rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), rule 32:1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See rule 32:1.13 comment [9].

[6] Paragraphs (b) and © contemplate a screening arrangement. See rule 32:1.0(k)

(requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph © operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by rule 32:1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

II. CASES

A. Current rules. As the current rules only became effective in 2005, there have not been many Iowa cases decided to this point. Two cases, however, should be noted.

Bottoms v. Stapleton, 706 N.W.2d 411 (Iowa 2005) involved a challenge to the same lawyer representing the majority stockholder and the corporation. Both had been sued by the minority shareholder, but this was not a derivative action.

The question to be answered under rule 32:1.7(a)(2) is whether there is 'a significant risk' that counsel's representation of one client 'will be materially limited by [his or her] responsibilities to another client.' See id. r. 32:1.7(a)(2). Although related to the old 'appearance of impropriety' test, the modern approach focuses on the degree of risk that a lawyer will be unable to fulfill his or her duties to both clients. See generally 1 *The Law of Lawyering* § 10.4, at 10-12 to 10-13 (noting the old standard was 'too vague and subjective' and was dropped from the ABA Model Rules of Professional Conduct).

Bottoms, 706 N.W.2d at 416.

the concept of a potential conflict of interest is foreign to the new ethical rule. That is because rule 32:1.7(a)(2) states that a conflict of interest "exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Iowa R. of Prof'l Conduct 32:1.7(a)(2) (emphasis added). In other words, if there is a significant risk that representation of one client will materially limit the representation of another client, a conflict of interest actually exists; it is not merely potential. See 1 *The Law of Lawyering* § 10.4, at 10-13. Thus, [**14] only an actual conflict of interest, as defined in rule 32:1.7(a), will justify disqualification.

Our review, then, will focus on the district court's conclusion that "there is a significant potential for divergence of the interests of Paducah and Stapleton." Translated to the terminology of rule 32:1.7, the court, in essence, found there was a significant likelihood that the defendants would have differing interests in this lawsuit. See Iowa R. of Prof'l Conduct 32:1.7 cmt. [8] (stating one of the critical questions under rule 32:1.7 is "the likelihood that a difference in interests will eventuate"). We must decide whether there is substantial evidence to support this finding.

Id. at 417. As the corporation as a true defendant, rather than the situation in a derivative suit, the Court found no reason for disqualification was shown.

The Court has also condemned a city prosecutor dismissing the traffic tickets of this clients, as well as representing them before the Iowa Department of Transportation when the license is suspended from that traffic violation. *Iowa Supreme Court Atty. Disciplinary Bd. v. Howe*, 706 N.W.2d 360, 374 (Iowa 2005); *Iowa Supreme Court Atty. Disciplinary Bd. v. Zenor*, 707 N.W.2d 176 (Iowa 2005).

B. Selected cases under prior rules. Many of the rules concerning conflicts have, of course, not changed with the implementation of the new model rules.

Both rules require disclosure and consent of the client to waive any conflict. The model rules do make an emphasis that such disclosures and waivers should be in writing. What has not

changed is the amount of information needed to be disclosed. The attorney is required to do more than simply warn his clients that there were potential conflicts and ask them to waive the conflicts. "[I]n a dual representation situation, it is not enough for a lawyer simply to inform the client that the lawyer is representing both sides. Full disclosure... requires the attorney not only to inform the prospective client of the attorney's relationship with the [other client], but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the [prospective client] obtain independent counsel." *Iowa Supreme Court Atty. Disciplinary Bd. v. Clauss*, 711 N.W.2d 1, 3 (Iowa 2006).

The Iowa Supreme Court has found that "Chinese walls" can be used to keep one lawyer in a firm from a particular case in a firm. It can only be used where there is no substantial relationship between two representations. The Court is to "consider whether a substantial relationship exists based upon the nature and scope of the prior representation, the nature of the present lawsuit, and whether confidences may have been disclosed." If there is no substantial relationship,

procedures must be followed to constitute a sufficient screening mechanism to prevent the potential disqualification of the firm. Such screening procedures must be timely implemented to protect confidential client information. We must also look at the nature and extent of the screening mechanism to determine whether it is adequate to prevent dissemination of confidential information between its new employee and the law firm.

Doe v. Perry Cmty. Sch. Dist., 650 N.W.2d 594, 600 (Iowa 2002).

The attorney becoming a witness can also be an issue. In *State v. Vanover*, 559 N.W.2d 618 (Iowa 1997) the defense attorney personally obtained statements from co-defendants that were incriminatory to them but exculpatory to his client. The likelihood that he would eventually

have to testify and be subject to credibility attacks. Eventually, the co-defendant plead guilty and was to testify against the defendant. There, counsel would have to testify to attack the credibility of the witness. This was also sufficient to warrant removing counsel. *State v. Vanover*, 559 N.W.2d 618, 631 (Iowa 1997). The lesson would seem to be to have an investigator or other third party at least present for any witness interviews.

Even office sharing arrangements can become problems. In *Committee on Professional Ethics & Conduct of the Iowa State Bar Assoc. v. Liles*, 430 N.W.2d 111 (Iowa 1988) office mates included a part time county attorney and the defense attorney. The Court weakly gave a public admonition, even though the attorneys were “not partners or associates in private practice although their office sharing arrangement may well have misled the public into believing otherwise. The record on the arrangement is not clear. The public's interest in guarding against even an appearance of impropriety can be adequately served here by an admonition. We employ professional admonitions not so much by way of criticism as to instruct the bar.” *Id.* at 112-113. It is very much in question if this case would be decided in the same way under the new rules.

Of course, an assistant county attorney who accepts private employment will be prohibited from working on cases that she prosecuted. The attorney's office will also be conflicted out of the cases – a fact faced by the Youth Law Center when forced to withdraw from a great number of their cases. *Sorci v. Iowa Dist. Court*, 671 N.W.2d 482 (Iowa 2003).

C. Sixth Amendment Right to Counsel. The right to counsel guaranteed by the Sixth Amendment includes the “right to representation that is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 261, 271; 101 S.Ct. 1097, 1103 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 345-50, 100 S. Ct. 1708, 1716-19, 64 L. Ed. 2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475,

481-87, 98 S. Ct. 1173, 1177-80, 55 L. Ed. 2d 426 (1978). When a trial court fails to determine whether the defendant is receiving assistance of counsel unburdened by a conflict of interest, prejudice is presumed and reversal of the conviction is automatic. *Holloway*, 435 U.S. at 489, 98 S. Ct. at 1181. However, if the trial court fails to inquire into only a *potential* conflict of interest, there is no presumption of prejudice. *Mickens v. Taylor*, 535 U.S. 162; 122 S. Ct. 1237; 152 L. Ed. 2d 291 (2002).

Conflicts of this nature do not have to occur only with representation of co-defendants. Representation of a defendant and a primary State's witness may be sufficient. In that case, "counsel had a duty to protect the witness's rights as well as a duty to protect the defendant's rights. Thus, an actual conflict of interest arose." *State v. Watson*, 620 N.W.2d 233, 239 (Iowa 2000).

The choice of counsel is also rooted in the Amendment. If the Court wrongly denies a defendant his choice of counsel, that error complete with the denial and not subject to harmless error analysis. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (U.S. 2006).

In *Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999) the Court of Appeals found that the Iowa Supreme Court had unreasonably applied prior Supreme Court precedent in reviewing a Sixth Amendment conflict of interest claim. Defense counsel had accepted a job with the County Attorney's office and would shortly be working as a drug prosecutor with the same witnesses that would be testifying in the trial. Defendant was charged with drug offenses. The trial court was informed of the potential conflict, and both parties agreed that counsel should be replaced. The trial court denied the motion and required counsel to proceed to trial. The Iowa Supreme Court affirmed.

The 8th Circuit found that the trial court had not made inquiry as to the conflict, but simply assumed that all involved would perform adequately. “The trial court’s dialogue improperly assumed answers to questions that were never asked and were necessary to its determination of whether the alleged conflict of interest required the substitution of new counsel.” *Id.* at 872.

III: CASELOAD LIMITATIONS

The Sixth Amendment of the United States Constitution requires that a person charged with a crime be given the effective assistance of a lawyer. In order to be effective, the lawyer cannot be overburdened with an excessive caseload.

In 1973, the National Advisory Commission (NAC) published standards concerning public defender caseloads. Standard 13.12 states: “The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney year: not more than 200; and appeals per attorney per year: not more than 25. For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in on court in one proceeding.”¹

The ABA Standard Relating to the Administration of Justice notes that these standards “have proven resilient over time and provide a rough measure of caseloads.”²

¹ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, 1979, *Courts*. Washington, DC: National Advisory Commission, 186.

² *American Bar Association Standards for Criminal Justice, Providing Defense Services*, 3rd ed., Chicago, IL: American Bar Association: Washington DC, 1992: 72.

In 1976, the National Study Commission of Defense Services (NSC) published *Guidelines for Legal Defense Systems in the United States*. Guideline 5.1 states that

In order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system.

Caseloads should reflect national standards and guidelines. The determination by the defender office as to whether or not the workloads of the defenders in the office are excessive should take into consideration the following factors:

- (a) objective statistical data;
- (b) factors related to local practice; and
- © an evaluation and comparison of the workloads of experienced, competent private defense practitioners.³

This standard has been endorsed by the National Legal Aid and Defender Association (NLADA).

The American Bar Association has also endorsed caseload limitations. On February 5, 2002, the ABA House of Delegates adopted the “Ten Principles of a Public Defense Delivery System.” The ABA further resolved that the Ten Principles be used by each jurisdiction to assess its own individual needs. Principal 5 states as follows:

- 5. Defense counsel’s workload is controlled to permit the rendering of quality representation. Counsel’s workload, including appointed and other work, should

³ *Guidelines for Legal Defense Systems in the United States*, National Study Commission of Defense Services,, Guideline 5.1 (1976).

never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. *National caseload standards should in no event be exceeded*, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services and an attorney's nonrepresentational duties) is a more accurate measurement. (Emphasis added)⁴

It should be noted that the footnote to the "national caseload standards" references the NAC Standard 13.12, as well NSC Guideline 5.1.

American Bar Association Standards for Criminal Justice Std. 4-1.3(e) states that "[d]efense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation"⁵

Maximum caseload limitations have been adopted by several states, including the following:

Arizona	150 felony, 300 misdemeanor, 200 juvenile, 25 appeals
Florida	200 felony, 400 misdemeanor, 250 juvenile, 50 appeals
Georgia	150 felony, 400 misdemeanor, 200 juvenile, 25 appeals
Indiana	200 felony, 400 misdemeanor, 250 juvenile, 25 appeals
Louisiana	200 felony, 450 misdemeanor, 250 juvenile, 20 appeals
Massachusetts	200 felony, 400 misdemeanor, 300 juvenile

⁴ *The Ten Principles of a Public Defense Delivery System*, American Bar Association, Standard 5 (2002).

⁵ *American Bar Association Standards for Criminal Justice, Providing Defense Services*, 3rd ed., Chicago, IL: American Bar Association: Washington DC, 1992: 72.

Minnesota	100-120 felony, 250-400 misdemeanor, 175 juvenile
Missouri	40-180 felony, 450 misdemeanor, 280 juvenile, 28 appeals
Nebraska	50 serious felonies
Oregon	240 felony, 400 misdemeanor, 480 juvenile
Tennessee	55 Felony A cases, 148 Felony B cases, 302 Felony C, D & E cases, 500 misdemeanors, 273 juvenile cases
Vermont,	150 felony, 400 misdemeanor, 200 juvenile 25 appeals
Washington	150 felony, 300 misdemeanor, 250 juvenile and 25 appeals. ⁶

Among the recent findings of the American Bar Association Standing Committee on Legal Aid and Indigent Defendants was the following:

Witness confirmed that, due to chronic under-funding and a lack of essential resources, coupled with crushing attorney workloads and other factors, many indigent defense systems do not provide even constitutionally adequate representation, much less the type of quality representation recommended by national standards. As one witness explained, the most serious implication of the widespread failure to deliver adequate defense services to the poor is the constant risk and reality of wrongful convictions:

Until the past decade, I suspect that few persons believed that there were many genuinely innocent persons convicted of crimes in this country. Now we know that it happens with some frequency. The evidence of wrongful convictions is well documented and can be found in many sources, including books, law review articles and website. This reality underscores the enormous importance and urgency of establishing truly effective defense representation.⁷

Concerning caseload limitations, the report found that “oftentimes caseloads far exceed

⁶ Bureau of Justice Assistance, U.S. Department of Justice, *Keeping Defender Workloads Manageable*, 11-12 (2001).

⁷ American Bar Association, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* 16 (2004).

national standards, making it impossible for even the most industrious of attorneys to deliver effective representation in all cases.”⁸

In 1991, Rick Tessier, a public defender in New Orleans, was appointed to represent Leonard Peart. At the time of his appointment, Tessier was handling 70 active felony cases. His clients were routinely incarcerated 30 to 70 days before he met with them. In the period between January 1 and August 1, 1991, Tessier represented 418 defendants. Of these, he entered 130 guilty pleas at arraignment. He had at least one serious case set for trial for every trial date during that period.⁹ Because of the number of cases, Mr. Tessier filed a motion to find that he was unable to provide adequate counsel. The Louisiana Supreme Court, in reviewing the case, stated

We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.

... The conditions ... should be contrasted with the American Bar Association Standards for Criminal Justice (1991). These conditions routinely violate the standards on workload (Std. 4-1.3(e)) (“[defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation”); initial provision of counsel (Std. 5- 6.1) ([counsel should be provided to the accused ... at appearance before a committing magistrate, or when criminal charges are filed, whichever occurs earliest”); investigation (Std. 4-4.1) (“[defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case”); and others. *Id.* We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance. As the trial judge put it, “[not even a lawyer with an S on his chest could effectively handle this docket.” We agree. Many indigent defendants ... are provided with counsel who can perform only pro forma, especially at early stages of the

⁸ *Id.* at 19.

⁹ *State v. Peart*, 621 So.2d 780, 784 (Lo. 1993)

proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified. In light of the unchallenged evidence in the record, we find that because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants ... are generally not provided with the effective assistance of counsel the constitution requires.¹⁰

On May 13, 2006, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association issued Formal Opinion 06-441, titled "*Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation.*" The Committee found that accepting further criminal cases of indigent defendants beyond the ability to effectively represent the client is an ethical violation under the model rules.

Comment 2 to Rule 1.3 states that a lawyer's workload 'must be controlled so that each matter may be handled competently.' The Rules do not prescribe a formula to be used in determining whether a particular workload is excessive. National standards as to numerical caseload limits have been cited by the American Bar Association.¹¹ Although such standards may be considered, they are not the sole factor in determining if a workload is excessive. Such a determination depends not only on the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties. If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.¹¹

The Opinion goes on to describe what an attorney must do in this situation:

When a lawyer receives appointments directly from the court rather than as a member of a public defender's office or law firm that receives the appointment, she should take appropriate action if she believes that her workload will become, or already is, excessive. Such action may include the following:

¹⁰ *Id.*, 621 So. 2d at 789-790.

¹¹ Formal Opinion 06-441 at 4.

- requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level that she is able to accept new cases and provide competent legal representation; and
- if the excessive workload cannot be resolved simply through the court's not assigning new cases, the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.

If the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation.

When a lawyer receives appointments as a member of a public defender's office or law firm, the appropriate action to be taken by the lawyer to reduce an excessive workload might include, with approval of the lawyer's supervisor:

- transferring non-representational responsibilities within the office, including managerial responsibilities, to others;
- refusing new cases; and
- transferring current case(s) to another lawyer whose workload will allow for the transfer of the case(s).

If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until either relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.

In presenting these options, the Committee recognizes that whether a public defender's workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer's cases and other factors. When a public defender consults her supervisor and the supervisor makes a conscientious effort to deal with workload issues, the supervisor's resolution ordinarily will constitute a 'reasonable resolution of an arguable question of professional duty' as discussed in Rule 5.2(b).¹⁹ In those cases where the supervisor's resolution is not reasonable, however, the public defender must take further action.

Such further action might include:

- if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office; and

- if the lawyer is still not able to obtain relief filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.¹²

¹²*Id.* at 5-6.